118-279

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 462.

CAROLINE CARSON, APPELLANT,

vs.

MARY A. HYATT, AS EXECUTRIX AND DEVISEE AND HEIR-AT-LAW OF EDMUND HYATT; JOAQUIN DELMONTE, EXECUTOR OF EDMUND HYATT; MARY E. HYATT, HEIR-AT-LAW OF EDMUND HYATT, AND JULIA DELMONTE, AS DEVISEE AND HEIR-AT-LAW OF EDMUND HYATT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

FILED NOVEMBER 3, 1883.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 UNITED STATES OF AMERICA, *District of South Carolina:*

In Circuit Court, Fourth Circuit. In Equity.

Mary A. HYATT *et al.*, Complainants,

vs.

WILLIAM MCBURNEY *et al.*, Defendants.

Be it remembered that on the 9th day of March, A. D. 1880, the following proceedings were had in the circuit court of the United States for the district of South Carolina:

On the 9th day of March, A. D. 1880, as aforesaid, came into the said court Caroline Carson and filed a transcript of a record of a cause theretofore pending in the court of common pleas of the State [of] South Carolina for the county of Charleston, wherein Mary A, Hyatt, executrix, devisee, and heir-at-law of the estate of Edmund Hyatt; Joaquin Delmonte, executor of the said Edmund Hyatt, deceased, and Julia Delmonte, devisee and heir-at-law of the
2 said Edmund Hyatt, deceased, were complainants, and William McBurney, William Haseltine, Alfred L. Gillespie, and Thomas R. McGahan, members of the late firm of Hyatt, McBurney & Co., and Caroline Carson were defendants.

3 *Petition for Removal.*

UNITED STATES OF AMERICA, *District of South Carolina:*

In the Circuit Court.

MARY A. HYATT *et al. vs.* WM. MCBURNEY *et al.*

It is agreed by counsel that a true copy of the record in this case, as set out in the transcript for the writ of error to the supreme court of the State of South Carolina, from Nos. 6 to 25, inclusive, and No. 27, was duly filed on the 9th March, 1880, said numbers being as per schedule annexed.

To complete the record the clerk of the circuit court United States will copy only the motion of Mrs. Carson to amend, etc., and the affidavits supporting it, and the decree of Judge Bond remanding the case; and the clerk of the Supreme Court United States is requested to print this record at the end of the transcript first named.

The cases will be tried together.

JAMES LOWNDES,
Per H. E. Y.,
For Mrs. Carson.

EDWARD MCCRADY, JR., *For Appellees.*

4 No. 1. Original writ of error.
" 2. Summons & severance.
No. 3. Citation.
" 4. Affidavit of service.
" 5. Answer of justices of sup't court.

" 6. Complaint for foreclosure.
" 7. Answer of Caroline Carson.
" 8. Order granting Caroline Carson further time to answer.
" 9. Petition of Caroline Carson for removal.
" 10. Affidavit of James Lowndes.
" 11. Removal bond.
" 12. Report of Master Clancy, with testimony and will of Wm. A. Carson.
" 13. Decree of Judge Pressley disallowing removal.
" 14. Agreement of counsel.
" 15. Decree of Judge Pressley recommitting case to master.
" 16. Notice & grounds of appeal by Hyatt *et al.*
" 17. Exception on behalf of Mrs. Carson.
" 18. Decree & judgment of sup't court of South Carolina.
" 19. Notice of filing of remittitur and of application for decree of foreclosure.
" 20. Exception on behalf of Caroline Carson.
" 21. Order making judgment of supt. court the judgment of the circuit court.
" 22. Exception of Caroline Carson.
" 23. Decree of foreclosure.
24. Notice and grounds of appeal on behalf of Caroline Carson.
5 25. Additional grounds of appeal on behalf of *of* Mrs. Carson.
26. Final judgment of supreme court of South Carolina, to review which this writ of error is prosecuted.
27. Appendix (record of case Carson *vs.* Robertson).
28. Appeal bond.

JAMES LOWNDS,
Per H. E. Y., *For Mrs. Carson.*
EDWARD McCRADY, Jr.,
Appellees.

6 United States of America, *District of South Carolina:*

In Circuit Court, Fourth Circuit.

At a stated term of the circuit court of the United States for the district of South Carolina, begun and holden at Charleston, S. C., for the district aforesaid, the following proceedings were had:

Mary A. Hyatt *et al. vs.* Wm. McBurney *et al.*

And on the 10th day of December, A. D. 1881, came into the court the defendant, Caroline Carson, by her solicitors, James Lowndes, with A. G. Magrath and H. E. Young Esq'r's, and filed the following notice, order, and affidavits; which notice, proposed order, and affidavits are in the words and tenor following:

Proposed Order.

UNITED STATES OF AMERICA, *District of South Carolina:*

In the Circuit Court.

MARY A. HYATT *et al. vs.* WM. MCBURNEY *et al.*

7 On motion of James Lowndes (with A. G. Magrath & H. E. Young), solicitors for Caroline Carson, one of the defendants, it is ordered that she have leave to amend her answer in this cause by striking out the following words from the fourth paragraph of the said answer, that is to say, "where she has ever since resided and had her domicil-," and substituting therefor the following words, that is to say, "where she resided and had her domicil- till some time in the summer of 1877 (May or June), when she removed her domicil- and residence to the State of Massachusetts, and became a citizen thereof, and has ever since remained such, though her actual temporary domicil- has been during such period and now is in Europe, to wit, chiefly in Rome, Italy.

Affidavit of James Lowndes.

DISTRICT OF COLUMBIA, *ss:*

MARY A. HYATT *et al. vs.* WILLIAM MCBURNEY *et al.*

Personally appeared before me James Lowndes, who, being duly sworn, says that he drew the answer of Caroline Carson in the above-entitled cause, formerly pending in the court of common
8 pleas of Charleston county, in the State of South Carolina, and now removed to the circuit court of the United States for the district of South Carolina; that so much of the said answer as avers in the fourth paragraph after the words, "early in 1861 left South Carolina and went to New York," as follows, "where she has ever since resided and had her domicil-," is erroneous, and that the error is due entirely to the mistake of this deponent; that in June, 1877, Caroline Carson went to Massachusetts and resided there for some time, and declared her intention of becoming a citizen of that State, and executed at Boston, before John C. Roper, a declaration to that effect; that deponent's knowledge is derived from a letter of the said Caroline Carson to deponent, bearing date June 30th, 1877, at Brookline, Mass., and now in his possession, in which she states the above facts, and also stated that the said paper had been sent to her counsell in Charleston; that to the best of deponent's recollection the said Caroline Carson left America in the autumn of that year; that owing to the shortness of her actual residence in Massachusetts this deponent had at the time of his drawing the said answer entirely forgotten her residence in Massachusetts and the
9 above facts; that Caroline Carson knew nothing about the said answer, when it was filed, and as soon as she knew of it called attention to the mistake as to her citizenship; that this deponent knows of no act of the said Caroline Carson which constitutes a change of domicil from Massachusetts or a waiver of her right in

this regard, or any admission that she has not such domicil or any expression of intention to be a citizen of any State other than Massachusetts; that to the best of deponent's recollection the said Caroline Carson has for ten years had no residence in New York, and has been beyond seas continually since the autumn of 1877.

JAMES LOWNDES.

Sworn to and subscribed before me this the 28th day of November, A. D. 1881.

[SEAL.] LORENZO A. BAILEY,
U. S. Com'r for D. C.

Affidavits of Mary E. Dewey & Charles C. Dewey.

STATE OF MASSACHUSETTS :

SHEFFIELD, MASS., *November 21st*, 1881.

Personally appeared before me [and] made oath Mary E. Dewey [and] Charles C. Dewey that they are personally acquainted with Caroline Carson ; that about May or June, A. D. 1877, the said Caroline Carson came from New York, in the said State of Mas-
10 sachusetts with the declared intention and purpose of becoming a citizen of the said State of Massachusetts. Deponents know further that the said Caroline Carson lived in the State of Massachusetts till her departure for New York to take steamer to Europe.

[SEAL.] FRANK S. GRAY,
Notary Public.

Affidavit of Robert Winthrop.

STATE OF MASSACHUSETTS, *County of Suffolk, Boston :*

I, Robert C. Winthrop, on oath deposes and say that I am acquainted with Caroline Carson ; that she resided in the said State of Massachusetts a part of the summer of 1877, as a citizen of the said State; that I know this from the frequent declaration of the said Caroline Carson that she had become such a citizen and from the fact that she spent a part of the summer, to wit, a part of July, at my residence in Brookline, Massachusetts. I further say that said Caroline Carson left the State of Massachusetts with the avowed intention of taking ship at New York for Europe, and I have not seen her in the United States since such date.

ROB'T WINTHROP.

11 COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

BOSTON, *December 5th*, 1881.

Then personally appeared the above-mentioned Robert C. Winthrop and made oath that the foregoing affidavit by him subscribed is true. Before me—

[SMAL.] HORACE L. CHAPIN,
Notary Public.

And on the 10th day of December, 1881, this case came up for hearing before the Hon. Hugh J. Bond, circuit judge, upon a motion to remand the cause to the State court by the complainants, and, after hearing argument by Messrs. McCrady & Son, for complainants, and H. E. Young, for the defendant, Caroline Carson, the following order was passed on the 13th day of December, 1881, which said order to remand is in the words and tenor following:

Order to Remand.

THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

12 MARY A. HYATT, as Executor and as Devisee and Heir-at-Law of the Late Edmond Hyatt; Joaquin Delmonte, Executor of the said Edmund Hyatt, Deceased; Mary E. Hyatt, Widow and Heir-at-Law of the — Edmund Hyatt, and Julia Delmonte, as Devisee and Heir-at-law of the said Edmund Hyatt, Deceased,

vs.

WILLIAM MCBURNEY, WILLIAM MASELTINE, ALFRED L. GILLESPIE, and Thomas R. McGahan, Members of the Late Firm of Hyatt, McBurney & Co., and Caroline Carson.

This cause coming on to be heard, on motion to remand the same upon petition for removal from the court of common pleas for Charleston county, State of South Carolina, and the record therein, after hearing the pleadings and arguments of counsel—

It is ordered, adjudged, and decreed that the petition of Caroline Carson, not having been filed in the said State court until
13 after answer had been filed and the master under an order of reference, had proceeded to take testimony in the cause, the filing of said petition was too late, the trial of said cause, in the judgment of this court, having been begun.

It is further ordered and decreed that the said cause is hereby remanded to the court from which it was sought to be removed.

It is further ordered and adjudged that the motion to amend Mrs. Carson's answer be overruled.

The petitioner, Mrs. Caroline Carson, having prayed an appeal from the above decree, the same is hereby allowed, and the supersedeas bond is fixed at five hundred dollars ($500.00).

December 13, 1881.

HUGH L. BOND, *C't Judge.*

14 And on the 26th day of September, 1883, the defendant. Caroline Carson, came into the court and filed the following petition and allowance of an appeal.

In the Circuit Court of the United States for the District of South Carolina.

To the Honorable Hugh L. Bond, judge of the said court:

Caroline Carson respectfully showeth that in a cause in equity in the said court wherein Mary A. Hyatt & others were complainants

and the said Caroline Carson and others were defendants, a decree was made on the thirteenth day of December, A. D. 1881, remanding the said cause to the court of common pleas of Charleston county.

Wherefore she prays the allowance of an appeal from the said decree to the Supreme Court of the United States.

Sept. 26th, 1883.

JAMES LOWNDES,
Solicitor of Caroline Carson.

Appeal allowed and bond fixed at $250.00.
Sept. 26th, 1883.

HUGH L. BOND, *C't Judge.*

15 To William McBurney, Thomas R. McGahan, William Hasseltine, Alfred L. Gillespie:

You will please take notice that Caroline Carson, one of the defendants in the suit of Mary A. Hyatt, executrix, & others *versus* William McBurney and others, brought in the court of common pleas of Charleston county and removed to the circuit court of the United States for the district of South Carolina, is about to take an appeal from the decree rendered by the latter court on the 13th Dec., 1881, remanding the case to the said court of common pleas. You will please signify whether you desire to join in that appeal.

Sept. 13, 1883.

JAMES LOWNDES,
Att'y for Mrs. Carson.
With him A. G. MAGRATH,
H. E. YOUNG.

16 [Endorsed:] United States of America, district of South Carolina, fourth circuit. Mary A. Hyatt *et al. vs.* Wm. McBurney *et al.* Summons. Filed Oct. 10th, 1883. J. E. Hagood, C. C. C. U. S., dist. S. C.

UNITED STATES OF AMERICA,
District of S. C., Fourth Circuit, Charleston Coun.:

J. Lamb Perry, being duly sworn, says that he served the within paper on Thomas R. McGahan by delivering to him personally and leaving with him a copy of the same on the 5th day of October, 1883, and that he knows him to be the one mentioned and described therein as Thos. R. McGahan, and that the deponent is not interested in this action.

J. LAMB PERRY.

Sworn to before me the 6th Oct., 1883.

JENNINGS W. PERRY,
Not. Pub.

U. S. AMERICA,
District of South Carolina, Fourth Circuit, Charleston County:

R. G. O'Neale, being duly sworn, says that he served a copy of the within paper on Wm. McBurney personally on 5th Oct., 1883, and that he knows him to be the one mentioned therein as Wm. McBurney; and deponent further swears that he made due & diligent search for Alfred L. Gillespie & William Hasseltine and could not find them to serve on them a copy of the within, but deponent is informed & believes that they have removed from the limits of the State, their whereabouts being unknown to this deponent; and this deponent further affirms that he is not a party to or interested in this action.

R. G. O'NEALE.

Sworn to before me this 6th Oct., 1883.
JENNINGS W. PERRY,
Notary Pub.

17 *Citation.*

To Mary A. Hyatt, as executrix and devisee and heir-at-law of Edmund Hyatt; Joaquin Delmonte, executor of the said Edmund Hyatt; Mary E. Hyatt, heir-at-law of the said Edmund Hyatt, and Julia Delmonte, as devisee and heir-at-law of the said Edmund Hyatt:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty days after the date hereof, pursuant to an appeal allowed to Carline Carson, wherein the said Caroline Carson is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Hugh L. Bond, judge of the circuit court of the United States for the district of South Carolina, this twenty-sixth day of September, in the year of our Lord one thousand eight hundred and eighty-three.

HUGH L. BOND,
C't Judge.

18 [Endorsed:] Mary A. Hyatt, ex'ix, *et al. vs.* Wm. W. Burney *et al.* Citation. Filed Oct. 10th, 1883. J. E. Hagood, C. C. C. U. S., dist. S. C.

10 Wall., 427; 99 U. S., 506. I accept service for the within-named Mary A. Hyatt, Joaquin Delmonte, Mary E. Hyatt, & Julia Demonte of a copy of the within citation. Oct. 3, 1883. Edward McCrady, Jr.

19 UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In Circuit Court.

I, J. E. Hagood, clerk of the circuit court of the United States for the district of South Carolina, do hereby certify that the foregoing

is a true and correct copy of a portion of the records in this cause now in file in my office.

Given under my hand and seal of said court, at clerk's office in the city of Charleston, S. C., this the 19th day of October, A. D. 1883.

[Seal U. S. Circuit Court, District of So. Carolina.]

J. E. HAGOOD,
C. C. C. U. S., Dist. of S. C.

Endorsed on cover: S. Carolina C. C. U. S. No. 462. Caroline Carson, appellant, *vs.* Mary A. Hyatt, as executrix & devisee & heir-at-law of Edmund Hyatt; Joaquin Delmonte, ex'c'r of Edmund Hyatt; Mary E. Hyatt, heir-at-law of Edmund Hyatt, & Julia Delmonte as devisee & heir-at-law of Edmund Hyatt. Filed 3rd November, 1883.

118-279

Supreme Court U. S.
FILED.
APR 9 1886
JAMES H. McKENNEY.

Supreme Court of the United States.

No. 245.

CAROLINE CARSON,
Plaintiff in Error,

vs.

MARY A. HYATT et al.,
Defendants in Error.

BRIEF FOR MRS. CARSON,

ON THE REMOVAL QUESTION INVOLVED IN THE WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

CLARENCE A. SEWARD,
JAMES LOWNDES,
Of Counsel.

NEW YORK:
DOUGLAS TAYLOR, LAW PRINTER, 89 NASSAU STREET, Cor. FULTON.
1886.

Supreme Court of the United States.

No. 245.

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Plaintiff in Error,

vs.

MARY A. HYATT et al.,
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JAMES LOWNDES,
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NEW YORK:
DOUGLAS TAYLOR, LAW PRINTER, 89 NASSAU STREET, Cor. FULTON.
1886.

Supreme Court of the United States.

CAROLINE CARSON

vs.

MARY A. HYATT *et al.*

BRIEF FOR MRS. CARSON ON THE REMOVAL QUESTION INVOLVED IN THE WRIT OF ERROR TO THE STATE COURT.

ASSIGNMENT OF ERRORS.

The Court below erred—

1*st.* In not accepting Mrs. Carson's petition and bond; and,

2*d.* In proceeding after their filing "further in such suit."

STATEMENT OF FACTS.

This suit was brought in the Common Pleas for Charleston County, South Carolina, to foreclose a mortgage given by William McBurney and Alfred L. Gillespie to Edmund Hyatt, on the 8th of May, 1863. Mrs. Carson was not a party to this mortgage, and, therefore,

could not, by reason of the mortgage alone, have properly been made a party defendant. Why she was made a party defendant is stated in the Record (*p.* 7) as follows:

"That the said plantation above described, and which was conveyed to the said William McBurney and Alfred L. Gillespie, and by them mortgaged to the said Edmund Hyatt as above mentioned, was formerly the property of the late William A. Carson, who, by his will, after certain specific bequests, devised the residue of his estate, in which was included the said plantation, to his executors, or to such one of them as should qualify, with instructions to sell the same upon such terms as he or they might deem most judicious, and to apply the proceeds of sale upon certain trusts for the benefit of his wife, Caroline Carson, and of his sons, William Carson and James P. Carson. That, in pursuance of the said power and direction in the said will, Alexander Robertson and John F. Blacklock, executors of the said William A. Carson, sold and conveyed the said plantation to the said Elias N. Ball, who mortgaged the same to the said executors, to secure the credit part of the purchase money thereof, which said bond and mortgage these plaintiffs are informed and believe was paid and satisfied, and do so charge. That these plaintiffs are informed that, subsequently to the said mortgage by the said William McBurney and Alfred L. Gillespie to the said Edmund Hyatt, the said Caroline Carson, claiming in her own right, and as assignee of her sons' interest under their father's will, instituted proceedings in the United States Circuit Court for South Carolina, against William McBurney and Alfred L. Gillespie and the other copartners of the firm of Hyatt, McBurney & Co., excepting the said Edmund Hyatt, to set up and foreclose the mortgage given by the said Elias N. Ball to the said executors of William A. Carson, and that, in such proceedings, she has obtained a decree in her favor, as well as assignee of her sons' interest as in her own right under the said will, but that, as neither the said Edmund Hyatt, nor these plaintiffs, nor any other person representing the said Edmund Hyatt since his death, were parties to the said proceedings, these plaintiffs are not bound thereby. Wherefore, the plaintiffs pray * * * * that the said mortgage may be foreclosed, and the equity redemption barred, and the premises ordered to be sold, freed and discharged from any lien or incumbrance whatsoever of the said Caroline Carson."

Mrs. Carson was, therefore, joined as a defendant, either by reason of her beneficial interest as a prior mortgagee, or as claiming some interest under the decree of the Circuit Court.

The mortgage in which Mrs. Carson was interested was executed (*p.* 9), March 2d, 1857.

The decree of foreclosure of that mortgage was made by the Circuit Court of the United States (*pp.* 10–11) on May 10th, 1878 (*Old Record No.* 780, *p.* 102), and was affirmed by this Court at its October Term, 1878.

The issues thus raised were personal to Mrs. Carson, and the other defendants had no interest therein. There was, therefore, a controversy between the plaintiffs below and Mrs. Carson, which was wholly between citizens of different States, and was wholly between citizens of the State of New York and an alien, as plaintiff, and Mrs. Carson, a citizen of Massachusetts, and which could be fully determined as between them, without reference to the other defendants.

Mrs. Carson had, therefore, a right, under the Act of March 3d, 1875, to remove the suit into the Circuit Court of the United States for the District of South Carolina, if she were a citizen of Massachusetts, and complied with the requirements of such Act, or if the suit presented any question of Federal jurisdiction.

Mrs. Carson answered in the suit, setting up her beneficial interest in the original mortgage, and the proceedings in the Circuit Court for the foreclosure of

the same, and, in so doing, among other things, stated (*p.* 9):

"The defendant, who, during the late war, adhered to the cause of the Union early in 1861, left South Carolina and went to New York, where she has ever since resided and had her domicile."

and also averred (*p.* 11):

"That, in any event, the plaintiffs are estopped by the said decree from denying the validity of the said bonds and mortgage held by Robertson as trustee as aforesaid, or their priority to that of the plaintiffs; and she says that they cannot enforce their said mortgage, without first redeeming that of the defendant."

The complaint was sworn to on the 15th day of October, 1879. There is no statement in the Record when, or where, or upon whom any process of the State Court or any copy of the complaint was served.

It does not appear from such complaint when or where the will of Hyatt was proved, or by whom his executors were appointed. Nor does it appear of what State or States or countries any of the parties therein mentioned were citizens. The jurat (*p.* 8), states that the plaintiffs "are residents of the State of New York."

On the 16th of December, 1879, an order was made by stipulation between the parties, in these words:

"The time for the defendants in this case to answer having expired, on motion of McCrady & Son, plaintiff's attorneys, it is ordered that the case be referred to W. D. Clancy, Esq., one of the Masters of this Court, to take testimony and report the same; and, with the consent of the said plaintiff's attorneys, it is further ordered that the defendant Caroline Carson do have further time to answer the complaint herein, to wit, until the twenty-fourth day of January next, and that she be allowed to file the same under the signature of her counsel who has entered an appearance in the cause, without oath thereto."

This voluntary "appearance" is the only mode shown

in the Record by which the State Court obtained jurisdiction over Mrs. Carson, and no earlier date is assigned thereto than the date of the stipulated order, December 16th, 1879.

The Record states (*p.* 35), that the answer of Mrs. Carson was *duly* filed on the 31st of January, 1880.

When this controversy (*Robertson* v. *Carson*, 19 *Wall.*, 106) was originally before this Court, it said:

"It is competent for a party to make a change of domicile for the purpose of giving jurisdiction to the Federal Courts, where it could not otherwise exist."

On the 16th of February, 1880, Mrs. Carson filed, in the Court of Common Pleas for Charleston County, a petition entitled in the cause, and addressed to the Judges of the said Court in these words (*p.* 12):

"Your petitioner, Caroline Carson, respectfully showeth that the above-entitled suit is of a civil nature, and is now pending in this Court. The matter or amount in dispute is, exclusive of cost, the sum or value of five hundred dollars, and is of the value of over ten thousand dollars; that the controversy in the said suit is between citizens of different States, and between citizens of a State, and a citizen or subject of a foreign State; that your petitioner was, at the beginning of this suit, and still is, a citizen of the State of Massachusetts; and the said Joaquin Delmonte then was, and still is, a citizen or subject of Spain, and all the other parties, plaintiffs above mentioned, then were, and still are, citizens of the State of New York; that William McBurney and Thomas R. McGahan then were, and still are, citizens of South Carolina; that Alfred L. Gillespie then was, and still is, a citizen of Tennessee; and William Hasseltine then was, and still is, a citizen of California. Your petitioner further says that in the above-mentioned suit there is a controversy which is wholly between citizens of different States, and between a citizen of a State and a foreign State, namely, between the said plaintiffs and your petitioner, and which can be wholly determined as between them. And your petitioner offers herewith a bond, with good and sufficient surety, for her entering in said

Circuit Court of the United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court, if the said Court shall hold that this suit was wrongfully or improperly removed thereto. And she prays this Honorable Court to proceed no further therein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said Circuit Court of the United States in and for the District of South Carolina; and she will ever pray, &c.—*James Lowndes, Attorney for Petitioner.*"

This petition was accompanied (*p.* 13) by an affidavit entitled in the cause in these words:

"Personally appeared before me James Lowndes, and made oath that he is the attorney of Caroline Carson, and has read her petition for the removal of the said cause to the Circuit Court of the United States for the District of South Carolina, and that the facts therein stated are true to the best of his information and belief, save that he cannot aver that Dean Hall is of greater value than five thousand dollars and five hundred dollars; that his information as to the domicile of Hasseltine is drawn from a statement made to him by some person whose name he cannot recall; that his information as to the domicile of Caroline Carson is drawn from these facts, viz.: That about the 1st July, 1877, he received, in due course of mail, a letter from the said Caroline Carson, dated at Brookline, Massachusetts, in which she informed the deponent that she had made a declaration or affidavit of her change of domicile from New York to Massachusetts; and that deponent continued to receive letters from her in the latter State, during the month of July, 1877, and he knows her purpose to have been to become a citizen of Massachusetts, and he knows that she has not in fact for many years resided in New York.—*James Lowndes.*"

The petition was also accompanied by a bond, with two sureties (*p.* 14), the condition of which was as follows:

"Now if the said Caroline Carson, your petitioner, shall enter in said Circuit Court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said Court shall hold that said suit was wrongfully or improp-

erly removed thereto, then this obligation to be void; otherwise, in full force."

A transcript of the record in the suit in the State Court was filed (*p.* 35) in the Circuit Court of the United States for the District of South Carolina on the 9th day of March, 1880.

On the 27th of February, 1880, the Master made his report (*p.* 14) as follows:

"This case was referred to me by an order of this Honorable Court, bearing date the 16th day of December, 1879, 'to take testimony and report the same.' I beg leave to respectfully report that I have been attended by the solicitors of the plaintiff, Messrs. McCrady & Son, and by the Hon. A. G. Magrath, representing the answering defendant, Caroline Carson. The complaint and answer were duly read, and the plaintiff proceeded to prove her bond and mortgage, all of which will more fully appear by the testimony, a copy of which is filed herewith. At the close of the plaintiff's case the Hon. A. G. Magrath, counsel for Mrs. Caroline Carson, notified the Master that he had, on that day, to wit, the 16th day of February, 1880, filed a petition in the Clerk's Office of the Court of Common Pleas for Charleston County in behalf of Caroline Carson, the defendant, praying in her behalf the removal of this case into the United States Court, and that it was his purpose not to proceed with this cause before the Master. Mr. McCrady, Jr., then moved that the Master file his report of the testimony taken in the cause, as directed by the order of reference. I beg leave to file also with this report and testimony a transcript of record in the case of Wm. McBurney *et al. vs.* Caroline Carson, in the Supreme Court of the United States, introduced in evidence by the plaintiffs. All of which is respectfully submitted.—*W. D. Clancy, Master.*"

On the 25th of March, 1880, the Court of Common Pleas for Charleston County filed an opinion (*p.* 19) in these words:

"The plaintiffs in this case, except one, a Spanish subject, are citizens of the State of New York, and the controversy, as appears by the pleadings, is wholly between them and the defendant Caroline Carson, who, in her answer, states that she is also a citizen of that State. She

has also filed with her answer an exhibit of a previous case in the United States Court, relating to the same matter, in which case she was plaintiff, suing as a citizen of the State of New York. No motion has been made by her for leave to amend or withdraw her answer, nor has any affidavit or other testimony been submitted showing that her answer was erroneous, and the matter therein in reference to her citizenship was inserted by inadvertence or mistake. After this case had been referred to the Master, and after the filing of her said answer by the said defendant, and the Master, attended by the attorneys for plaintiffs and said defendant, had finished taking the testimony offered by the plaintiffs, the said defendant filed a petition in this Court, praying a removal of this case to the Circuit Court of the United States, and alleging that she is a citizen of the State of Massachusetts. That petition is not properly verified, and the insufficient affidavit by her attorney does not state any matter which would justify me in disregarding the positive statement in her answer and exhibit. I, therefore, hold that the controversy in this case is between a citizen of the State of New York, on the one side, and other citizens of the same State and a Spanish subject, on the other side; and further that the petition of defendant for the removal of the case was not filed until after the trial had commenced. She is, therefore, not entitled to have the case removed from this Court, and her motion to that effect is refused."

The exhibit referred to in this opinion is not printed in the Record. What such exhibit was is shown by the answer (*pp.* 10–11). It was the record in the suit commenced by Mrs. Carson, on the 11th of August, 1866, in the Circuit Court of the United States for the District of South Carolina against Alexander Robertson and others, to reinstate and foreclose her mortgage. Such record constitutes a portion of the records of this Court, and was known as No. 780, at the October Term, 1878. If the Court desires, and has the right to look at such record, it will find it on its files. It was not necessary, therefore, to reprint it. The bill in that case was filed on the 11th of August, 1866. It is not sworn to. It commences as follows :

"Caroline Carson of the City of New York, and a citizen of the State of New York, &c."

How such unsworn record, being *res inter alios*, and speaking as of the month of August, 1866, could be taken as evidence by the Court below of Mrs. Carson's citizenship in February, 1880, is not perceived.

On the 9th of September, 1881, a decree of foreclosure (*pp.* 31–33) and sale in this suit was made by the State Court. Mrs. Carson thereupon appealed (*p.* 33) to the Supreme Court of the State, and among other grounds of appeal said (*p.* 35):

"that having complied with the provisions of the Act of Congress of the 3d March, 1875, regulating the removal of causes from the State Courts to those of the United States (18 *Statutes at Large*, 470), by filing her petition in this cause for the removal thereof from the State Court to the United States Court for the District of South Carolina, and by giving the bond required by said act, and by the filing the transcript of the record of the State Court in the Circuit Court of the United States for South Carolina District, as was done by her on the 9th of March, A. D. 1880, all rightful jurisdiction of the State Court ceased, and all further proceedings thereon are null and void."

The opinion of the Supreme Court of the State was, among other things, as follows (*p.* 38):

"The case, as has been stated, was referred to the Master, who proceeded to hold the reference, when, after one or two sittings, Mrs. Carson, through her attorney, gave notice to the Master that he had that day filed a petition in the Clerk's office, praying, among other things, the removal of the cause into the United States Court, and that he would not continue the reference before him. Whereupon, the attorney of the plaintiffs moved that the Master file his report of the testimony taken. Under this state of things the case came for hearing before Judge Pressley, who dismissed the petition for removal, holding that the defendant, under the circumstances, was not entitled to the motion, it appearing in the answer by her own statement that she was a citizen of the same State as the plaintiffs, the State of New York, and

no affidavit being submitted that the statement was erroneous, or inserted by mistake; and further that the petitioner came too late, it having been presented after filing of her answer in the cause, and after the Master, attended by the attorneys on both sides, had finished taking the testimony offered by the plaintiff; and, moreover, that the petition was not properly verified, the affidavit of the attorney not being sufficient to justify him in disregarding the positive statement in the answer of Mrs. Carson as to her citizenship * * * * * * (*p.* 42). Did Judge Pressley err in refusing the removal of this cause to the Circuit Court of the United States for the District of South Carolina? Judge Pressley, in his order refusing the motion to remove, gives the reasons for his action. They seem to us to be quite sufficient, and to be sustained by authority. It did not appear from the record of the case to the satisfaction of Judge Pressley that the parties were citizens of different States, nor was the petition filed within proper time, as required by the Act of Congress. Chief Justice WAITE in the *Railway Co.* v. *Ramsey* (*22 Wall.*, 328), said: 'To sustain a transfer of a suit the party claiming it must file in the State Court a petition therefor, and tender the requisite security. Such petition must state facts sufficient to entitle him to have the transfer made. This cannot be done without showing that the Circuit Court would have jurisdiction of the suit when transferred. The one necessarily includes the other. If, upon the hearing of the petition, it is sustained by proof, the State Court can proceed no further.' The facts stated in this petition were perhaps sufficient to entitle the petitioner to the order, had the petition been filed within proper time, and had the facts stated been sustained by the record as a whole; but the petition broke down at both of these points. It was not filed as required by the Act of Congress (1875), at or before the term at which the suit could have been tried; nor did it appear upon the face of the record that the citizenship of Mrs. Carson was in Massachusetts. True this fact was stated in the petition, but her answer distinctly stated that she was a citizen of New York. Thus the record on its face failed to show the important fact required for removal (*Meyer* v. *Construction Co.*, 100 *U. S.*, 457). Hence Judge Pressley had no other alternative but to dismiss the petition upon both of the grounds mentioned."

The residue of the language of the Chief Justice in *Railway Co.* v. *Ramsey* (*22 Wall.*, 328), not quoted by the State Supreme Court in its opinion, is as follows:

"It has no discretion, and is compelled to permit the transfer to be made. The petitioning party is then required to file in the Circuit Court copies of the process, and of all pleadings, depositions, testimony, and other proceedings in the State Court. *This includes the proceedings by which the transfer was effected, and these, as has been seen, must show the facts necessary to give the Circuit Court jurisdiction.*"

The second section of the Act of 1875 authorizes a removal from the State Court into the United States Court of any suit of a civil nature, at law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States.

The complaint, as has been stated, averred, with reference to the foreclosure proceedings upon Mrs. Carson's mortgage, in the United States Circuit Court, that (*p.* 7)—

"As neither the said Edmund Hyatt, nor these plaintiffs, nor any other person representing the said Edmund Hyatt since his death, were parties to the said proceedings, these plaintiffs are not bound thereby."

The answer avers (*p.* 11) that—

"In any event, the plaintiffs are estopped by the said decree from denying the validity of the said bonds and mortgage held by Robertson as trustee aforesaid, or their priority to that of the plaintiffs; and she says that they cannot enforce their said mortgage without first redeeming that of the defendant."

The Code of Practice of South Carolina is said to be that which was adopted in 1869–1870, as amended by the Act of November 25th, 1873 (*XV. Stat.*. 498), and reenacted by the Act of March 8th, 1875 (*id.*, 871).

By that code it is provided (*Section* 9), that there shall be two Circuit Courts, to be called (1) Common Pleas, (2) General Sessions; and it designates (*Section* 17)

a Circuit Court for Charleston County, in the First Circuit.

By *Section* 18 the Common Pleas of Charleston County are directed to commence their terms on the second Mondays of February, June, and November in each year.

The complaint in this suit was sworn to on the 15th of October, 1879. The second Monday of November, 1879, fell on the 10th of the month, and thus left sixteen days of October and nine in November before the November Term commenced. There were, therefore, twenty-five days between the 15th of October and the commencement of the November Term.

The Code (*Section* 92) abolishes the distinction between actions at law and suits in equity, and prescribes that there shall be thereafter but one form of action, to be called a civil action.

An action for the foreclosure of a mortgage is directed (*Section* 146) to be brought in the county where the realty is situated.

By *Section* 150 it is provided that a civil action must be commenced by a summons. By *Section* 151 it is provided that the summons shall be directed to the defendant, and require him to answer the complaint, and to serve a copy of his answer within twenty days after the service of the summons, exclusive of the day of service.

By *Section* 153 it is provided that a copy of the complaint need not be served with the summons. In such case the summons must state where the complaint is or will be filed, and if the defendant, within twenty days

thereafter, causes notice of appearance to be given, and in person or by attorney demands in writing a copy of the complaint, specifying the place within the State where it may be served, a copy thereof must, within twenty days thereafter, be served accordingly, and after such service the defendant has twenty days to answer.

There is no proof in the record of the issuance and service of any summons, or that any complaint accompanied it. There is no proof in the record of the service of the complaint, or of the date of such service. The only indication of the probable time of such service is the date of the jurat to the complaint, which was October 15th, 1879. If the complaint was properly served on that day on Mrs. Carson's representatives—and, presumptively, it could not have been served before it was sworn to—then the answer was due during the whole of the day on the 4th of November, 1879, which was five days before the commencement of the November Term of the Common Pleas for the year 1879.

By *Section* 195 twenty days' time is given to amend an answer after it is served.

Section 278, as amended by the aforesaid Acts of 1873 and 1875, provides that: "At any time *after issue* and at least *fourteen* days *before* Court, the plaintiff *shall* file in the Clerk's office the summons and complaint in the cause, *endorsing* thereon *the nature of the issue* and the number of the docket upon which the same shall be placed; and if the plaintiff fail to do so, the defendant, seven days before the Court, *may* file copies of said papers, with like

endorsement, and the Clerk shall thereupon place said cause upon its appropriate docket and it shall stand for trial without any further notice of trial or notice of issue."

This provision is mandatory only so far as a plaintiff is concerned, and determines with precision at what term a suit can "be first tried," within the meaning of the Removal Act of 1875. The term must be one after issue joined and before which there are fourteen clear days, otherwise the plaintiff cannot lawfully file the pleadings or docket the cause. The permission accorded to the defendant cannot be availed of by him unless the plaintiff is legally in default. If the issue has not been joined, or if after issue joined there are not fourteen or seven clear days before the Court, then neither party can lawfully docket the cause. The day of the commencement of the Court is under this statute industriously excluded by the use of the word "*before.*"

If the answer was due on the 4th day of November, there were five days only before the commencement of the November Term on the 10th day, or second Monday of November, 1879. The suit could not, therefore, have been lawfully docketed for that term, as there were not fourteen days remaining after the 4th of November, and but five days only "before Court" on the 10th of November.

The first term, therefore, at which the suit could have been legally docketed for trial was the February Term, commencing on the second Monday of February, 1880,

which fell on the 9th of that month. The petition was filed on the 16th of February.

The Code further declares (*Section* 268) that a judgment is the final determination of the rights of the parties in the action.

Section 273 provides that an issue of fact arises: (1) upon a material allegation in the complaint controverted by the answer; or (2) upon new matter in the answer controverted by the reply.

Section 275 declares that a trial is the judical examination of the issues between the parties, whether they be issues of law or of fact.

Section 276 provides that an issue of law must be tried by the Court, unless it be referred as provided in *Sections* 294 and 295. An issue of fact in an action for the recovery of money only, or of specific real or personal property, or for a divorce of the marriage contract, on the ground of adultery, must be tried by a jury, unless a jury trial be waived, as provided in *Section* 290, or a reference be ordered, as provided in *Sections* 294 and 295.

Section 277 provides that every other issue is triable by the Court, which, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury, or it may be referred, as provided in *Sections* 294 and 295.

Section 282 provides that either party giving the notice may bring the issue to trial.

Section 291 provides that upon the trial of a question of fact by the Court, its decision shall be given in

writing, and shall contain a statement of the facts found, and conclusions of law separately, and, upon a trial upon an issue of law, the decision shall be made in the same manner, stating the conclusions of law,

Section 294 provides that all or any of the issues in the action, whether of fact or of law, or both, may be referred upon the written consent of the parties.

Section 295 provides that where the parties do not consent, the Court may, upon the application of either, or of its own motion, except where the investigation will require the decision of difficult questions of law, direct a a reference in the following cases: (1) where the trial of an issue of fact shall require the examination of a long account on either side, in which case the Referees may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein; or (2) where the taking of an account shall be necessary for the information of the Court before judgment, or for carrying a judgment or order into effect; or (3) where a question of fact, other than upon the pleadings, shall arise upon motion or otherwise in any stage of the action.

ARGUMENT.

An analysis of the opinions of the Common Pleas, and of the Supreme Court of South Carolina, shows that those Courts were not unanimous as to the grounds upon which they refused to accept the petition of Mrs. Carson.

The Common Pleas said (*p.* 19) that the plaintiffs, with one exception, were citizens of the State of New York, and that the excepted one was a Spanish subject—that it appeared from the answer that Mrs. Carson was also a citizen of the State of New York—that the petition was not properly verified—and that such petition was not filed until after the trial had commenced.

The Supreme Court said (*p.* 38), that it appeared in the answer, by her own statement, that Mrs. Carson was a citizen of the same State as the plaintiffs, viz., the State of New York—that the petitioner came too late, her petition having been presented after the filing of her answer in the cause, and after the Master had taken the testimony offered by the plaintiff—that the petition was not properly verified; but that (*p.* 43) the facts stated in the petition were perhaps sufficient to entitle the petitioner to the order, had the petition been filed in time, and had the facts been sustained by the record as a whole; but the petition broke down at both of these points—that it was not filed as required by the Act of Congress (1875) at or before the term at which the suit could have been tried—that it did not appear upon the face of the record that the citizenship of Mrs. Carson was in Massachusetts

—that this fact was stated in the petition, but her answer distinctly stated that she was a citizen of New York—and that the record on its face failed to show the important facts required for removal.

There are three important questions in this case:

1. Was the fact of diverse citizenship presented to the Common Pleas in the manner required by the Act of 1875?

2. Was the suit removable for any cause under that Act?

3. Were the petition and bond presented at the proper time?

WHEN A PETITION AND BOND, WHICH CONFORM IN ALL RESPECTS TO THE ACT OF 1875, ARE PRESENTED TO A STATE COURT, THAT COURT HAS NO LAWFUL AUTHORITY TO REFUSE TO ACCEPT THE SAME, OR TO TRY BY ALLEGED EVIDENCE ALIUNDE THE TRUTH OF THE PETITION.

Section 2 of the Act of 1875 is jurisdictional, and prescribes the cases in which a suit may be removed from the State Court to the Federal Court.

Section 3 of the same Act prescribes in a directory manner the method by which such removal is to be effected. It requires the making and filing of a petition, setting forth the jurisdictional facts required by *Section* 2, and the making and filing of a bond with the conditions specified.

Section 5 authorizes the Circuit Court to dismiss or

remand a cause, when it has been improperly removed thereto.

A petition for a removal is a new proceeding, adverse to the right of the other party to continue the cause in the State Court and tenders a new issue to which the relations of the parties are changed and which is triable by the Federal Court alone.

As was said by this Court in *Gold Washing Co.* vs. *Keyes* (96 *U. S.*, 199):

> "For the purposes of the transfer of the cause, the petition for removal, which the statute requires, performs the office of a pleading."

The Act of 1875 does not authorize the State Court to receive either an oral or a written pleading on behalf of the adverse party to raise an issue between himself and the petitioner. Nor does it authorize a State Court, *sua sponte*, to raise such issue, and then to undertake to decide it upon evidence *aliunde* the petition. Therefore, when a petition and bond are in exact compliance with the Act of 1875, and are presented as by that act required, the State Court absolutely loses jurisdiction, and has no lawful authority to refuse to accept the petition, or to proceed to hear and determine the cause.

This is so, both upon principle and authority. The question whether the jurisdictional facts really exist, which authorize the removal of a cause, is a question solely for the Federal Court to determine. The Act of 1875 states the jurisdictional facts necessary, and prescribes the mode by which they are to be presented to the State Court. It also confers upon the Federal Court, and upon it alone, a

right to determine whether the suit is one properly within the jurisdiction of that Court. Not having conferred any power upon the State Court, when the petition and bond are sufficient on their face, and presented in proper time, to investigate as to the truth of the facts alleged, it follows of necessity that, when the petition and bond are in strict compliance with the statute, and are presented in proper time, the State Court cannot go behind them for the purpose of determining that the suit is one which does "not really and substantially involve a dispute or controversy within the jurisdiction of said Circuit Court." That inquiry is under § 5 for the Federal Court alone.

There are many decisions both in the State and Circuit Courts, and in this Court, upon the point.

In *Illius* v. *N. Y. Co.* (13 *N. Y.*, 597), the plaintiff had appealed from an order, refusing to vacate an order of the Special Term, transferring the cause to the Circuit Court of the United States, pursuant to the 12th Section of the Judiciary Act of 1789. The Court said :

"It was claimed, however, on the argument of the motion, that the order transferring the cause was wholly inoperative, on the ground that the case was not within the Judiciary Act above referred to. The Circuit Court, therefore, it was urged, will acquire no jurisdiction, and hence the action is determined everywhere. To this it may be answered that the United States Circuit Court will either assume jurisdiction of the suit and proceed to judgment, or it will not. If it does, then, certainly, the action has not yet been determined. If it refuses to do so, then the order complained of will be vacated, and the case will proceed in the Supreme Court. The question of jurisdiction must be decided by the Circuit Court itself, and, however it may decide, we cannot see that the suit will not proceed in the one Court or the other."

In *Indianapolis* v. *Risley* (50 *Ind.*, 62) the Court said:

"We are of opinion that, if the petition is sufficient, it was the duty of the State Court 'to proceed no farther in the cause,' but at once to transfer the jurisdiction to the Circuit Court of the United States. So are all the decisions in the Courts of the United States, and also in the State Courts, with the exception of a few of the earlier cases."

In *Chamberlain* v. *American Co.* (18 *N. Y. Supreme Ct. Reports*, 372) the Court said:

"The appeal is from an order denying a motion to vacate that order [for a removal] on the ground that it was 'improvidently and inadvertently granted.' It could not have been improvidently or inadvertently granted, if the case was one within the provisions of the Act of Congress, under which the petition was presented, and the jurisdictional facts were shown, and the requisite security given; because, in such a case, the Court below would have no right to exercise any discretion. I think the only questions which we have any power upon this appeal to consider are, whether the petition did set forth the jurisdictional facts required by the Act of Congress, and whether the security offered was such as to call for its approval by the Court below."

In *Shaft* v. *Phenix Co.* (67 *N. Y.*, 544) the Court said:

"By the proceedings for removal the State Court is *ipso facto* ousted of jurisdiction, whether an order of removal has been granted or denied by it."

In *Terre Haute Co.* v. *Abend*, (9 *Ill. App.*, 308) the Court said:

"It is now a quite well-settled doctrine that, after the filing of a petition and bond in due form of law, the State Court has no power to refuse the removal, and can do nothing to affect the right, and its rightful jurisdiction ceases *eo instanti*. No order for removal is necessary, and every subsequent exercise of jurisdiction by the State Court, including the judgment, if one is rendered, is erroneous."

In *Western Union Co.* v. *Horach* (9 *Ill. App.*, 311) the Court said:

"In *Matthews* v. *Lyall* (6 *McLean*, 13), it is said the State Court

had no right to deny the removal. The Court declares that, under such circumstances, the State Court shall proceed no further in the case, and the Supreme Court have held that all subsequent proceedings are erroneous. In *Kanouse* v. *Martin* (15 *How.*, 208), after the petition and bond had been filed, the Court said: 'But the Court proceeded to make enquiry into the intention of the plaintiff, not to claim of the defendant the whole of the matter then in dispute upon the record, and allowed the plaintiff to reduce the matter then in dispute to the sum of $499, by an amendment to the record.' It then proceeded further in the cause, which the Act of Congress forbids. All its subsequent proceedings, including the judgment, were, therefore, erroneous. To require the defendant to answer further would be to deny him his right to have all the proceedings in the State Court cease. It would engraft upon the Act of Congress a new proviso, that, although the Court was required to proceed no further in such suit, yet it might proceed and make further orders in the cause, and this, although the defendant had done all which the laws required to obtain the right to remove the suit."

In *Field* v. *Lownsdale* (*Deady*, 289) the Court said:

"The order of removal made in the State Court is not conclusive upon the question of jurisdiction in the Federal Court. Notwithstanding this removal, this Court must determine for itself whether it can take jurisdiction of the cause."

In *Fish* v. *Union Pacific Co.* (8 *Blatch.*, 247) NELSON, J., said:

"No affidavits can be read before the State Court in opposition. The application on the petition is *ex parte*, and depends upon the papers upon which it is founded; and, if they are regular and conform to the requirements of the statute, the Court has no discretion. The act (July 27th, 1868) is peremptory."

In *Jones* v. *Oceanic Co.* (11 *Blatch.*, 406) the Court said:

"The petition for removal states merely that the defendant has a defense arising under the Act of March 3th, 1851, and prays for a removal of the suit into this Court under the Act of July 27th, 1868. It is objected that the petition does not set forth affirmatively facts from which the Court can see that the defense is one arising under the Act of 1851. * * The petition is sufficient, without stating what the

defense is. The contest as to the actual existence and validity of the alleged defense * * cannot be determined on an interlocutory motion, if the proceedings for the removal have conformed to the statute. Such contests can be determined only on formal pleadings, and proofs in this Court (*Dennistown* v. *Draper*, 5 *Blatch.*, 336; *Mayor* v. *Cooper*, 6 *Wall.*, 247)."

In *Heath* v. *Austin* (12 *Blatch.*, 321) the Court said

"The cause was regularly removed into this Court on the defendant's oath as to the jurisdictional fact of residence and citizenship in Connecticut. At most, the plaintiff raises a doubt only on that question. In such case, the jurisdiction is to be maintained as the Act of Congress makes such oath *prima facie* evidence of the jurisdictional fact."

In *Cobb* v. *Globe Ins. Co.* (3 *Hughes*, 456) the Court said:

"By the filing of the petition and bond in the State Court, showing that the controversy is one 'between citizens of different States,' the jurisdiction of the State Court from that moment ceases, and all that that Court may do in the matter afterwards is *coram non judice*, null and void. The question of the sufficiency of the bond itself, the competency of the petition, the validity of the removal, and each and all questions arising upon the petition, are taken away by this law (1875) from the State Court, and reserved by Section 5 for the United States Circuit Court, to be passed upon, in the exercise of the unembarrassed and undivided jurisdiction which this act gives it, under the authority of the Constitution, over all 'controversies between citizens of different States.'"

In *Dennis* v. *The County of Alachua* (3 *Woods' Rep.*, 689) the Court said:

"While the Supreme Courts of some of the States, among them Massachusetts, Wisconsin and Virginia, have held this to be necesary before a removal can be effected, others, Rhode Island and Missouri, for instance, have held that the filing of the petition and bond, *ipso facto*, suspends the jurisdiction of the State Court. The Supreme Court of Missouri, in the case of *Herryford* v. *The Ætna Insurance Company* (42 *Mo.*, 148), uses the following emphatic language: 'When a

party makes an application for a removal of a cause in the manner required by the Act of Congress, it is error in the State Court to proceed further in the matter, and every subsequent step is *coram non judice.*' While there is this conflict of opinion between the Supreme Courts of the different States, there is a uniform current in the decisions of the Federal Courts, to the effect, that if the case be within the Act of Congress, and the petition is in due form, accompanied by the required bond, the jurisdiction of the State Court ceases, *eo instanti*, upon the filing of the petition and bond, in the State Court, either in term time or in vacation. Drummond, Circuit Judge, and Blodgett, District Judge, in *Osgood* v. *The Chicago, Danville and Vincennes Railroad Company* (6 *Biss.*, 330) say: 'Having filed the petition and bond with the clerk in the given case, the applicant has done all that the statute requires. He need not call upon the Court to act at all. No order is to be made in Court, at least the Statute names none, unless the mandate that the Court shall accept the petition and bond implies one.' Judge Dillon expresses the same opinion at page 66 of his pamphlets on the removal of cases. Woods, Circuit Judge, in *Ellerman* v. *The New Orleans, Mobile and Texas Railroad Company* (2 *Woods*, 120), says: 'The presentation of the proper petition and bond is, by the Act of Congress, as well as by the decision of the Supreme Court of the United States, effectual to suspend all the powers of the State Court in which the suit is,' and he cites, for this position, the cases of *Insurance Company* v. *Dunn* (19 *Wall.*, 214); *Insurance Company* v. *Morse* (20 *Wall.*, 445); *Kanouse* v. *Martin* (15 *How.*, 198) and *Gordon* v. *Longest* (16 *Pet.*, 97). I might well stop here, but the language of Mr. Justice Strong, sitting in the United States Circuit Court for the Western District of Pennsylvania, in June, 1878, since the passage of all the acts on the subject of removal is so forcible and so appropriate to the point under consideration, as to justify a quotation from him, even after citing the decisions of the Supreme Court to the same effect. In *Taylor* v. *Rockafeller* (6 *Reporter*, 226), where the State Court had adjudged that the record and petition did not exhibit a case proper for removal under the Acts of Congress, and had refused to part with its jurisdiction, Mr. Justice Strong says: 'If the petition and record exhibited a case which the petioners had a right to remove, it was not in the power of the State Court to deny the right by any judgment it could give. The Act of Congress declares that after the petition and bond are filed, the State Court shall proceed no further in the suit. The petition is filed in the suit. It is thus made part of the record, and, by the act of

filing, the suit is withdrawn from the jurisdiction of the State Court. It is to be observed, that no order of the State Court for a removal is necessary, certainly none since the Act of 1875 ; nor is any allowance required. The allowance is made by statute.' Learned counsel contend that this construction is not courteous to the State tribunals, and that it will destroy the comity which ought to exist between the Federal and the State Courts. I should much regret such a result, since there is, in this State at least, the best understanding, both officially and personally, between the Judges of the Federal and State Courts. But the ruling will give no just cause of offense, and I apprehend none will be taken, for it is not a matter of courtesy or comity, but one of positive law, made in pursuance of the Constitution of the United States, and binding alike upon the Federal and State Courts. Neither should be superserviceable in the effort to appear courteous, when both are bound by a positive rule of law which compels the one to relinquish and the other to take jurisdiction. The State is supreme within its sphere, but the 'Constitution and the laws of the United States which shall be made in pursuance thereof, * * * shall be the supreme law of the land, and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to contrary notwithstanding' (Const. of the United States, Article VI.). The Federal Government cannot submit the interpretation of its Constitution and laws to any tribunal save its own, and this fundamental principle has been so long and so well understood that its application should not produce the least sensitiveness in any quarter. The motion to remand the case to the State Court is denied."

In *Mackey* v. *Mallory* (16 *How. Pr. Reps.*, 29) the State Court had refused to remove a cause, holding—

"That it was its duty to examine the right of removal—that, as the right of removal was dependent upon the nature of the controversy, such right must be determined by an inspection of the complaint, as the only pleading then before the Court—that the petition for removal was not a pleading, and could not vary the cause of action stated in the complaint—that the defendant could not use his petition as a pleading to raise an issue with the plaintiff on the allegations of the complaint and show a controversy entitling him to remove the cause"

The defendant filed the record in the Circuit Court, and the plaintiff moved to remand. The defendant opposed. Judge BLATCHFORD stated the views of the defendant as follows:

"Succinctly stated, the view urged is, that, where the removal depends upon the nature of the controversy in respect to the necessary parties to it, the nature of the controversy is not dependent on the shape which the plaintiff gives to the controversy when it is developed by the proofs—that, when the petition for the removal avers the existence of such a controversy as would, if the allegation were true, authorize a removal, and the petition admits nothing stated in the complaint, and takes notice of nothing in it, except to controvert it, the State Court must cease from jurisdiction—and that, where there is a conflict between the complaint and the petition, the petition alone must be regarded"—

and he denied the motion to remand.

In *Kern* v. *Huidekoper* (103 *U. S.*, 490) this Court said:

"The jurisdiction was, of course, originally in the State Court * * The petition for its removal, filed July 6th, 1877, contained every averment required by law. It was filed at the proper time, and it was accompanied by a bond with good and sufficient surety, conditioned according to the statute. According to the terms of the Act of Congress, it was the duty of the State Court 'to accept such petition and bond, and proceed no further in such suit.' Notwithstanding the refusal of the State Court to make an order for the removal of the cause, the defendants in error, within the time prescribed by the statute, filed a transcript of the record in the State Court in the Circuit Court of the United States. This invested the latter Court with full and complete jurisdiction of the case, for, in the language of the section just referred to, 'the said copy being entered as aforesaid in said Circuit Court of the United States, the cause should then proceed in the same manner as if it had been originally commenced in said Circuit Court.' If the cause is removable, and the statute for its removal has been complied with, no order from the State Court for its removal is necessary to confer jurisdiction on the Court of the United States, and no refusal of such order can prevent that jurisdiction from attaching

(*Insurance Co.* v. *Dun*, 19 *Wall*, 214). * * When the pre-requisites for removal have been performed, the paramount law of the land says that the case shall be removed, and the case and the *res* both go to the Federal Court. When a case has been properly removed from a State into the United States Court, and the State Court still goes on to adjudicate the case against the resistance of the party at whose instance the removal was made, such action on its part is a usurpation, and the fact that such a party has, after the removal, contested the suit, does not, after judgment against him, constitute a waiver on his part of the question of the jurisdiction of the State Court to try the case (*Insurance Co.* v. *Dun*, 19 *Wall.*, 214; *Removal Cases*, 100 *U. S.*, 457; *Railroad Co.* v. *Mississippi*, 102 *U. S.*, 135)."

In *Railroad* v. *Kountz* (104 *U. S.*, 15) the Court said:

"The right to remove is derived from a law of the United States, and whether a case is made for removal is a Federal question."

In *Steamship Co.* v. *Tugman* (106 *U. S.*, 122) the Court said:

"The right of the company to have a trial in the Circuit Court of the United States became fixed upon the filing of the petition and bond."

The State Court, therefore, had no authority to make an issue under the petition, or to try that issue, or to determine it adversely to Mrs. Carson.

None of the grounds assigned by the Courts below for their refusal to accept Mrs. Carson's petition and bond are tenable or defensible.

There was no proof before the Court, other than the petition of Mrs. Carson, upon the question of the citizenship of the plaintiffs.

The Common Pleas said (*p.* 19):

"The plaintiffs in this case, except one, a Spanish subject, are citizens of the State of New York, and the controversy, as appears by the pleadings, is wholly between them and the defendant, Caroline Carson, who, in her answer, states that she is also a citizen of that State."

This finding by the Common Pleas was based solely upon Mrs. Carson's petition, and for the purpose of defeating it.

It is at least an uncommon, if not an unknown, rule, of law, which permits a State Court to accept a portion of a petition as true, and to reject the other portions. Under the Act of 1875, the petition is a unit, and it is not within the province of the State Court to give it credence as to a portion, and to disbelieve it as to the residue.

The Common Pleas having found that the plaintiffs were all citizens of the State of New York or aliens, and the petition having also stated that fact, it may be assumed to be true.

The question now arises—Had the State Court a right to refer to the answer, or to an exhibit, for the purpose of finding an averment upon which to base its refusal to accept the petition and bond?

The Supreme Court of the State said (*p.* 43):

"The facts stated in this petition were perhaps sufficient to entitle the petitioner to the order, had the petition been filed within proper time, and had the facts stated been sustained by the record as a whole, but the petition broke down at both of these points * * nor did it appear upon the face of the record that the citizenship of Mrs. Carson was in Massachusetts. True, this fact was stated in the petition, but her answer distinctly stated that she was a citizen of New York. Thus the record on its face failed to show the important fact required for removal."

This was treating the answer of Mrs. Carson, which was not signed or verified by her, as a "record," and then applying to it the rule that it imported such absolute verity as not to admit of any proof or averment to the contrary.

THE PLEADINGS IN A CASE BEFORE JUDGMENT ARE NOT IN ANY JUDICIAL OR JURIDICAL SENSE A "RECORD."

Originally, all pleadings were oral, and it could not be predicated of such pleadings that they constituted a "record" in any legal sense, That, by the practice of the Courts, the pleadings came subsequently to be reduced to writing does not give them any higher degree of efficacy than the previous oral pleadings. Neither in any proper sense of the word can be called a "record."

In *Jacob's Law Dictionary* (*Vol.* 5, *pp.* 396, 397) is this definition :

"RECORD. *Recordum*, from the Lat. *Recordari*, to remember. A Memorial or Remembrance; an authentic Testimony in writing, contained in rolls of parchment, and preserved in a Court of Record, *Briton*, *c.* 27. In these rolls are contained the judgment of the Court on each case, and all the proceedings previous thereto, carefully registered, and preserved in the public repositories set apart for that purpose. The term *Record* is applied to such proceedings of Superior Courts only, and does not extend to the rolls of inferior Courts; the registeries of proceedings whereof are not properly called Records. *Co Litt.*, 260. There are three kinds of Records, *viz.:* A *judicial Record*, as an attainder, &c., a *ministerial Record* on oath, being an office or inquisition found, and a *Record* made by conveyance and consent, as a *Fine*, *Recovery*, or a Deed *inrolled*. 4 *Rep.*, 54. *Records*, being the rolls or memorials of the Judges, import in themselves such incon-

trollable verity, that they admit of no proof or averment to the contrary, insomuch that they are to be tried only by themselves."

Comyn says :

"A record is a memorial of a proceeding or act of a court of record entered in a roll of parchment for the preservation of it."

Mrs. Cameron's answer was not, therefore, in any sense a "record," nor did it import any more verity than her petition imported.

The proceeding, by the new pleading constituted by the petition, was a proceeding in which Mrs. Carson was the actor and the plaintiffs were defendants. The question raised by the new pleading was a question solely of removal of jurisdiction, and not involving any of the issues presented by the original pleadings. The Court below erred in undertaking to decide the issue raised by the petition by a reference to a pleading in a distinct and independent matter, and which was not a "record."

When a case is removed from a State Court the action of the State Court in removing it is final, and the pleadings then become a "record." But, until such removal is sanctioned, the State Court not having taken any final action, the pleadings still remain purely and simply "pleadings," and, as such, do not import the verity of a "record."

The reference by the Court below to Mrs. Carson's answer in the State suit was a reference to a matter not then before it, and was in effect a reference to the pleadings in what was then at that time, for the purpose of the jurisdictional inquiry, substantially another suit.

Such reference was not authorized by the statute, and the pleading referred to was in no sense evidence, binding Mrs. Carson by its statements as an admission.

STATEMENTS IN PLEADINGS IN A PENDING, UNDETERMINED SUIT, OR IN A PREVIOUS SUIT BETWEEN OTHER PARTIES, ARE NOT EVIDENCE, NOR CAN THEY ACT BY WAY OF ESTOPPEL IN ANOTHER PROCEEDING.

In *Church* v. *Shelton* (2 *Curtis*, 274) the Court said:

"The question whether a bill in equity or a libel in Admiralty can be used in evidence as a confession by the party filing it of the particular facts stated therein has been the subject of much doubt. * * * In *Boilean* v. *Rutlin* (2 *Exchq.*, 664, decided in 1848) the Court of Exchequer, after a careful examination of all the previous authorities at law and in equity, in England and Ireland, came to the decision that a bill in Chancery is not evidence of the truth of the facts stated in it, as against the party in whose name it is filed, even though his privity is shown, but it is only admissible to show that the suit was instituted and the subject-matter of it. I consider this decision to be in conformity to the weight of authority in this country. The American authorities are collected by *Cowen & Hill*, in Volume 4, p. 48. Some recent decisions are: *Adams* v. *McMillan* (7 *Porter*, 73); *Durden* v. *Cleveland* (4 *Ala.*, 225); *Isaac's Lessee* v. *Clarke* (2 *Gill*, 1)."

In *Combs* v. *Hodge* (21 *How.*, 404) the Court said:

"The record in the District Court in New Orleans, in the suit between Love and Hodge, appended to the bill, does not contain evidence applicable to this case. The parties to that suit were different, and the petition and answer are signed by counsel, and not by the parties, and cannot be resorted to for admissions of the respective parties."

In *Shepard* v. *Pratt* (32 *Iowa*, 299) the Court said:

"In our opinion, the evidence introduced to overthrow Clarissa's title falls far short of being satisfactory, and is entirely insufficient. The only evidence upon this point which, in our opinion, tends to prove

the existence of a trust is found in the fact that, in an answer to a petition filed by Pratt, Clarissa and her husband aver that the land was conveyed to Clarissa as security for a part of the purchase price thereof paid by her. This answer was signed and filed by an attorney, and was not sworn to. * * *. The evidence shows that the answer was drawn by the attorney for the defendants, without instructions from them to insert therein the allegation in question. No statement was made by them to the attorney authorizing the allegation to be made, or upon which it could have been based."

The Court below, therefore, erred, first, in treating the answer as a record, and, secondly, in construing its alleged admission of Mrs. Carson's citizenship and the averment in the exhibit as competent evidence as against her, upon her new petition for the removal of the cause.

THE ANSWER OF MRS. CARSON DOES NOT ALLEGE THAT SHE WAS A CITIZEN OF NEW YORK.

The supposed fatal admission of Mrs. Carson in her answer was in these words (*p.* 9):

"The defendant who, during the late war, adhered to the cause of the Union, early in 1861 left South Carolina, and went to New York, where she has ever since resided and had her domicile."

(1.) It is obvious that the pleader used the word "resided" and "domicile" as synonymous; or, as the word "domicile" is defined by WEBSTER, as "a place of permanent residence;" or, as the answer states, "where she has ever since resided."

This averment was irrelevant, immaterial, and in the strictest sense of the word "surplusage." It was not responsive or germane in any way to the case made against Mrs. Carson by the complaint.

Comyn says :

"Surplusage shall not hurt. That which in a pleading may be rejected as surplusage will not vitiate, and that is surplusage whose statement, whether in a general or circumstantial way, is quite unnecessary to the point in question."

Again. This surplus averment was "new matter," not constituting a counterclaim under Section 173 of the State Code, and it was, therefore, by virtue of the provisions of Section 191 of that Code, denied as emphatically as if the denial had been in a formal replication.

Section 191 reads as follows :

"The allegation of new matter in the answer, not relating to a counterclaim, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require."

This then having been the state of the "record" it is not perceived how such "record" disproved the averment of citizenship in the petition.

(2.) If the plaintiffs were citizens of New York and aliens, and Mrs. Carson were a citizen of Massachusetts, then her attorneys in the Court below were not lawfully empowered to surrender her right of removal, nor did they undertake to exercise any such right.

An attorney has no implied authority to give up any right of his client (*Wadhams* v. *Gay*, 73 *Ill.*, 415; *Alsop* v. *Bell*, 24 *Beavan*, 459), and, if he acts in ignorance of the facts, the client is not bound (*Furnival* v. *Bogle*, 4 *Russell*, 142), and any admission made by him in order to bind his client must be distinct and formal, and made for the express purpose of dispensing with formal proof of a fact at the time (*Treadway* v. *Sioux City*, 40 *Iowa*, 426).

In *Howe* v. *Lawrence* (22 *N. J. Law*, 106) the Court said:

"The stipulation to waive the judgment of this Court * * * * was not an agreement for the conduct of the cause. It was a deliberate surrender of his client's rights, a surrender which I conceive the counsel had no power to make, and which, if he had the power, justice would never permit to be enforced. * * * * The agreement was entered into under some misapprehension, and ought not to be enforced by the Court."

The power of the attorney is limited to the defence of the action as brought, and does not extend to the relinquishment of an independent right not involved in the issue tendered by the complaint.

(3.) The surplus averment in Mrs. Carson's answer was not as matter of fact or of law an averment that she was a citizen of the State of New York. Domicile flows from residence, and, without residence, there can be no domicile.

Residence is defined by *Dicey on Domicile* (*p.* 76) as follows:

"*Residence.* The nature of residence, considered as a part of domicile, and thus looked at as a physical fact, independently of the *animus manendi* has been little discussed. It may be defined, as already suggested, as habitual physical presence in a place or country. If the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile. And it may be well to note again that 'residence' is often used as including the *animus manendi*, and hence as an equivalent to home or domicile."

The averment in Mrs. Carson's answer, therefore, was in legal effect that, since 1861, she had resided in the State of New York.

This averment did not authorize the Courts below to find, as they did, that she was a citizen of the State of New York, and of the same State with the plaintiffs. "Residence" and "citizenship" are not synonymous terms under the Act of 1875.

To test this, suppose that the complaint in the Court below had averred the citizenship in Massachusetts of all the plaintiffs save one, and that he was an alien—that Mrs. Carson's answer had been in the precise language in which it now is—and that she had filed her petition in the State Court, saying nothing about the citizenship of either party, but relying upon the statements of the complaint and answer in reference thereto. Could she, under these circumstances, have successfully removed the cause into the Circuit Court, upon the ground that the complaint and answer showed affirmatively that the suit was depending between citizens of different States?

Under the authorities, there can be but one answer to this question; because they are concurrent in holding that, under the Removal Acts, an allegation of residence is not equivalent to an allegation of citizenship, and is insufficient to give the right of removal or the right to the Federal Court to retain the cause.

In *Brock* v. *Doyle* (18 *Florida*, 172) the Court said:

"The allegation in this petition is that the 'petitioners reside in or near the City of Brunswick, in the State of Georgia.' The Supreme Court of the United States has uniformly held that, in such a case as this, the State Court is not bound to surrender its jurisdiction upon a petition for removal, until at least a petition is filed which, upon its face, shows the right of the petitioner to the transfer (5 *Otto*, 187). The statement does not amount to an allegation that the petitioners

are citizens of the State of Georgia. In the case of *Parker et al.* v. *Overman* (18 *How.*, 141), which was a case in which a removal was sought, it was held that, in a petition for removal it is not enough to allege that the petitioners were residents of another State. Say the Court, 'citizens' and 'residents' are not synonymous terms. See also 8 *Peters*, 115."

In *Kelley* v. *Haughton* (23 *Fed. Rep.*, 417) the Court said:

"This case will have to go back to the State Court on the ground, if on no other, that it is not alleged in the petition, or in the pleadings, of what State the plaintiff is a citizen. It is alleged that Wetherbee is a citizen and resident of Boston, Massachusetts, but it does not allege of what State the plaintiff is a citizen. It is averred that he is a resident, but does not state that he is a citizen, of California. He may be a resident and not a citizen of California. It is defective in that particular."

In *Brown* v. *Keene* (8 *Peters*, 115) the Court said:

"The petition avers that the plaintiff, Richard Raynal Keene, is a citizen of the State of Maryland; and that James Brown, the defendant, is a citizen or resident of the State of Louisiana, holding his fixed and permanent domicile in the parish of St. Charles. The petition, then, does not aver positively that the defendant is a citizen of the State of Louisiana, but in the alternative, that he is a citizen or a resident. Consistently with this averment, he may be either. The additional words of description, 'holding his fixed and permanent domicile in the parish of St. Charles,' do not aid this defective description. A citizen of the United States may become a citizen of that State in which he has a fixed and permanent domicile; but the petition does not aver that the plaintiff *is* a citizen of the United States. The question is, whether the jurisdiction of the Court is sufficiently shown by these averments. The Constitution extends the judicial power to 'controversies between citizens of different States;' and the judicial act gives jurisdiction, 'in suits between a citizen of the State where the suit is brought and a citizen of another State.' The decisions of this Court require, that the averment of jurisdiction shall be positive, that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively from its averments,"

and the cause was dismissed for want of jurisdiction.

In *Robertson* v. *Cease* (97 *U. S.*, 646) this Court said:

"Here the only fact averred, or appearing from the record, is that Cease was a resident of Illinois, and we are asked, in effect, in support of the jurisdiction of the Court below, to infer argumentatively from the mere allegation of 'residence,' that, if not an alien, he had a fixed permanent domicile in that State, and was a native or naturalized citizen of the United States, and subject to the jurisdiction thereof. By such argumentative inferences it is contended that we should ascertain the fact, vital to the jurisdiction of the Court, of his citizenship in some State other than that in which the suit was brought. We perceive nothing in either the language or policy of the XIV. Amendment which requires or justifies us in holding that the bare averment of the residence of the parties is sufficient *prima facie* to show jurisdiction."

In *Parker* v. *Overman* (18 *How.*, 141) the Court said:

"In the petition to remove this case from the State Court, there was not a proper averment as to the citizenship of the plaintiff in error. It alleged that Parker 'resided' in Tennessee, and White in Maryland. 'Citizenship' and 'residence' are not synonymous terms."

In *Grace* v. *American Co.* (109 *U. S.*, 284) the Court said:

"The record does not satisfactorily show the citizenship of the parties. The complaint filed in the State Court shows that the firm of W. R. Grace & Co., composed of William R. Grace, Michael P. Grace and Charles R. Flint, is doing business in New York, and that William R. Grace and Charles R. Flint are residents of that State. The petition for the removal of the cause shows that the defendant is a corporation of the State of Missouri; that William R. Grace and Charles R. Flint reside in New York, and that Michael P. Grace is a resident of some State or country unknown to defendant, but other than the State of Missouri. The record, however, fails to show of what State the plaintiffs are citizens. They may be doing business in, and have a residence in New York, without necessarily being citizens of that State. They are not shown to be citizens of some State other than Missouri."

There is no averment in the answer tending to show that Mrs. Carson was not an alien, or that she was either

a naturalized or a native born citizen of the United States.

The answer, therefore, did not afford any proof as to her citizenship, and, therefore, was not in conflict with the averment in her petition that she was a citizen of the State of Massachusetts.

It was error, therefore, in the Courts below to assume that the averment in Mrs. Carson's answer was a relevant and necessary averment, lawfully made, and that it conclusively admitted that her citizenship was in the State of New York.

It was also error to hold that the answer was a "record" which estopped Mrs. Carson from denying its truth by the facts stated in her petition. It was also error to refer to the exhibit of 1866 as containing any evidence upon the question of her citizenship in 1880. (Such exhibit was put in evidence on page 20 of the record.)

The Answer was not an Estoppel.

Coke says:

"An estoppel must be certain to every intent, and not be taken by argument or inference" (*Co. on Litt.*, 352 *b*).

In *Mason* v. *Ashton* (9 *N. Y.*, 35) the Court said:

"The action made no issue upon this point, and its admission of the execution of the will is merely argumentative. It was not put in issue by the cause, nor could it have been made a material issue in that action. One of the principles in relation to an estoppel, is that it must be certain to every intent, and not be taken by argument or inference."

In *Burlen* v. *Shannon* (99 *Mass.*, 200) the Court said:

"It is only when a fact is specially put in issue, traversed and tried, that a verdict and judgment following it are evidence against the party, and, therefore, the estoppel does not extend to any incidental or collateral matter, even though it may have been raised and passed upon" (*Lewis' Appeal*, 67 *Penna. State*, 153).

In *Hopkins* v. *Lee* (6 *Wheaton*, 114) this Court said, when speaking of a judgment or decree (and not of a pleading pure and simple), that it was—

"Not conclusive upon points which came only collaterally under consideration, or which were only incidentally under cognizance and which only could be inferred from enquiry from the decree."

In *Providence* v. *Adams* (11 *Rhode Island*, 195) the Court said:

"A question which is tried without being in any way involved in the action, is not concluded by a verdict or judgment in it."

In *Voge* v. *Breed* (14 *Ill. App.*, 538) it was held that a formal verdict was conclusive only as to facts directly and distinctly put in issue, and the findings of which are necessary to uphold the judgment, and that it is not conclusive as to facts which may be in controversy, but which were purely collateral.

So also in *Althorp* v. *Beckwith* (14 *Ill. App.*, 628) it was held that it was not enough that the question was in issue in the prior suit; it must also appear to have been precisely determined.

The judgment in the Court below (*pp.* 31–33) does not in any way pass upon the question of Mrs. Carson's citizenship, and it was error, therefore, for that Court to treat a preliminary pleading, not signed by Mrs. Carson

or verified by her, as overcoming her allegation of citizenship in the petition presented by her for the removal of the suit and as estopping her from insisting upon the truth of the petition.

THE PETITION WAS WELL SIGNED BY MRS. CARSON'S ATTORNEY AND COUNSEL (*Removal Cases*, 100 *U. S.*, 471).

It was not necessary that it should have been verified, and, therefore, it was a matter of no moment that it was "not properly verified" (*Osgood* v. *Chicago*, 6 *Bissell*, 331).

In that case the Court said:

"It is not necessary that the petition for removal be verified by affidavit. When the petition and bond are filed in the State Court during vacation, the jurisdiction of that Court ceases; it does not remain until the Court can act upon them in term time; and it is not for the State Court to decide whether a proper case is made. * * It is said we treat the State Court with disrespect in not allowing them to pass upon the case under the statute. We would treat them more disrespectfully, if we disregarded and overruled their action, as it is admitted we would have the right to do in a proper case."

To the same effect as to the verification are *Canal Co.* v. *Hart* (5 *Sup. Ct. Rep.*, 1131, and 114 *U. S.*, 660), and *Sweeney* v. *Coffin* (1 *Dillon*, 73).

THE PETITION WAS AN AMENDMENT OF THE ANSWER.

It was the duty of the Court below to do what the Circuit Court might have done, viz., to consider the petition as an amendment to the answer, and to act thereon as such.

In *Barclay* v. *Levee Commissioners* (*1 Woods*, 255) the original petition described the plaintiff as a resident of the City of New Orleans. The suit was against a political corporation of Louisiana. By a supplemental and amended petition, filed in the Circuit Court after the removal of the cause, the plaintiff stated that that ascription to himself of a residence in the City of New Orleans was a mistake of his attorney; that he was, and for many years had been, a citizen and resident of the State of Tennessee, and he furnished his own affidavit and the affidavits of others to show the truth of this allegation. Justice BRADLEY said:

"The defendants move to dismiss the petition on several grounds: First, that the parties are not such as to give this Court jurisdiction. The plaintiff has shown that he is a citizen of Tennessee, and was so when the suit was originally commenced, and the defendants, being political or *quasi*-political corporations of Louisiana, are necessarily citizens of the latter State So far as citizenship of the parties goes, therefore, the Court has jurisdiction."

See, also, *Ayres* v. *Watson* (113 *U. S.*, 598).

THE PLEADINGS SHOWED THAT THE SUIT WAS REMOVABLE UNDER THE ACT OF 1875.

The Circuit Court for the District of South Carolina had jurisdiction of the suit upon another ground than that of the citizenship of the parties, and, therefore, it could not properly have remanded the cause even if the citizenship necessary to sustain its jurisdiction did not appear upon the removal papers.

In *Osgood* v. *Chicago* (6 *Bissell*, 336) the Court said:

"But the fifth section does not authorize the Court to remand or dismiss the cause, for the reason that it may appear that there was any irregularity in the means taken to procure the removal. The purpose obviously was, if the record was filed in the Federal Court under the law, and the Court could see that it had jurisdiction of the case, that it should retain it, notwithstanding there might be defects in the manner of removal."

In *Ruckman* v. *Ruckman* (1 *Fed. Rep.*, 591) Judge NIXON said:

"The suggestion was made on the argument that, as the petition for removal alleged as authority for the same, one of the grounds stated in the first clause of the second section of the act, if the Court found upon enquiry that the cause did not fall within these provisions, it should be remanded, without looking further and ascertaining whether the record disclosed any other ground on which the removal could be based. I do not so understand the law. The question in this Court is not whether the counsel for the petitioners comprehends and assigns the true reasons for the removal, but whether the whole record reveals a case over which the Court has jurisdiction. No matter how irregularly the petition brings up the suit, when it is here, the only question is, whether it involves a controversy properly within the jurisdiction of the Court. If it does, it will not be remanded because a mistake was made by the counsel of the petitioners in assigning grounds for the removal which prove to be untenable. Such is a fair construction of the provisions of the fifth section of the act, and such, I understand, was held to be the law by Judge Drummond in *Osgood* vs. *The Ry. Co.* (6 *Biss.*, 336)."

In *Norris* v. *Mineral Co.* (7 *Fed. Rep.*, 272) Judge BLATCHFORD said:

"The petition states facts which make out a case for removal under the first clause of Section 2 of the Act of March 3d, 1875 (18 St. at Large, 470). The plaintiff was, at the time the suit was brought, a citizen of Pennsylvania, and the defendants were then, some of them, citizens of New York, and the rest citizens of Massachusetts. The mistake in the petition, by referring to the wrong statute, is unimportant, when the facts set forth in it made a case for removal under the Act of 1875."

The views thus presented are sustained by the cases of *N. P. T. Co.* v. *Lowenberg* (9 *Sawyer*, 352), *Clark* v. *Chicago* (11 *Fed. Rep.*, 357), *Parker* v. *Overman* (18 *How.*, 141), *Houser* v. *Clayton* (3 *Woods*, 275), *Hodgson* v. *Bowerbank* (5 *Cranch*, 303), and the *Pacific Railway Removal Cases* (115 *U. S.*, 1).

So also, if it be necessary, in order to sustain the jurisdiction, the Circuit Court will allow an amendment of the petition in that regard. (*Woolridge* v. *McKenna*, 8 *Fed. Rep.*, 678–679, and cases last above cited.)

The answer of Mrs. Carson pleaded the binding effect by way of estoppel of the decree in her favor affirmed by this Court at its October Term, 1878, and of the sale thereunder. This alone presented a Federal question, sufficient to sustain the jurisdiction in error of this Court from the judgment of the Court below.

In *Insurance Co.* v. *Murphy* (111 *U. S.*, 738) this Court pronounced an opinion, of which the head note is as follows :

"This Court has jurisdiction in error over a judgment of the Supreme Court of Louisiana in a suit by one citizen of that State against another, for the foreclosure of a mortgage on real estate therein, when the only controversy in the case is as to the effect to be given to a sale of the property under an order of the District Court of the United States in bankruptcy to sell the bankrupt's mortgaged property free from incumbrances."

That case was cited by this Court in *New Orleans* v. *Delamore* (114 *U. S.*, 501), in an opinion, the head note of which is as follows :

"This Court has jurisdiction in error over a judgment in a suit in a State Court determining the effect to be given to a sale of the property in controversy by order of a District Court in bankruptcy."

In the former case, the Court said—and the remark was clearly applicable to the latter case also—

"Both the parties, therefore, rely upon rights under Federal authority, and as the right of the plaintiff in error was denied by the Court, the writ of error lies."

See also *New Orleans* v. *Delamore* (114 *U. S.*, 501), and *Factors Co.* v. *Murphy* (111 *U. S.*, 738).

The enquiry now is, whether, under the Removal Act of 1875, when such a question "upon rights under Federal authority" arises, and is shown by the record, the cause may not be retained by the Circuit Court, even though that ground was not assigned in the State Court for the removal.

The argument which upholds the writ of error, would seem to be equally applicable to uphold the original jurisdiction of the Circuit Court.

Again. Section 709 of the Revised Statutes, authorizing the re-examination by this Court of a judgment or decree by a State Court, is founded upon Section 2 of Article III. of the Constitution, which is in these words:

"The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority."

Each specification of ground, therefore, for a writ of error to a State Court must find its authority in this constitutional provision, and such provision is to be inter-

preted as authorizing the writ in each of the three classes of cases specified in Section 709.

The difference of phraseology between the Constitution and the Revised Statutes is immaterial, so long as the Constitution sanctions the writ in each class of cases in which the Revised Statutes provide that it may issue.

The second section of the Act of 1875 gives the right of removal in

"Any suit of a civil nature at law or in equity * * * * arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority."

This being a repetition of the language of the Constitution, it results that the right of removal, under the Act of 1875, is precisely the same right which is given under Section 709 of the Revised Statutes, and that it is optional with a party when to exercise it—whether at the commencement, or the end, of the litigation in the State Court. The right, whenever exercised, has the same foundation (*Starin* v. *Mayor*, 6 *Sup. Ct. Rep.*, 28; *House* v. *Clayton*, 3 *Woods*, 275).

If, therefore, the pleadings in the suit in the State Court presented a Federal question, the Circuit Court had a right to retain it—if removed in time—even though the petition did not refer to such question.

The remaining question is—

WERE THE PETITION AND BOND PRESENTED IN TIME?

The language of the Act of 1875 is—

"May make and file a petition in such suit before or at the term at which said cause could be first tried, and before the trial thereof."

It has already been shown that the first term at which this cause could have been legally docketed for trial, by a fourteen days' notice to the clerk in the State Court, was the term which commenced on the second Monday of February, 1880, which fell on the 9th of February. The petition and bond were filed and presented on the 16th of February. This was obviously the first term at which the cause could have been legally docketed for trial, and, therefore, the first term at which, under any circumstances, it could have been tried.

The pressing point of the enquiry is—were such petition and bond filed "before the trial thereof?"

The suit was a suit in Chancery, and obviously, in order to be triable, it must have been ripe for argument before a Court or Judge (*Scott* v. *Clinton Co.*, 6 *Bissell*, 529).

"The term" means the same term for both parties—not one term to the plaintiff, and another to the defendant; because the statute gives the right of removal to each of the parties alike (*Ins. Co.* v. *Saettel*, 33 *Ohio State Reps.*, 282).

In *Gurnee* v. *County of Brunswick* (1 *Hughes*, 277) the CHIEF JUSTICE said:

> "As soon as the issue is made up the cause is ready for trial. * * The first term, therefore, at which a case can be tried, is the first term at which there is an issue for trial. An application for removal, to be in time, must be made before, or at this term."

It is not material that the petition was presented "after the filing of her answer in the cause" (*p.* 38), if it was presented before or at "the term at which said

cause could be first tried, and before the trial thereof"—that is, the term fixed by the Act of 1875—and no other criterion is prescribed.

In *Warner* v. *Penn. R. R. Co.* (6 *Hun*, 197) the phrase in the statute was defined as meaning a Court first afterward held, for which it could have been noticed, and, at which it could have been tried.

It has already been shown that the issue in this cause was duly joined on the 31st of January, 1880, and that such issue, even if due on the 4th of November, 1879, could not have legally been docketed for trial at a term earlier than the one which commenced on the 9th of February, 1880.

That the "term" intended by the Act of 1875 is the first one at which the cause could be legally noticed for trial is also decided by the cases of *Forrest* v. *Edwin Forrest* (1 *Fed. Rep.*, 462); *Knowlton* v. *Congress Co.* (13 *Blatch.*, 170); *Stough* v. *Hatch* (8 *Fed. Rep.*, 7); *Ames* v. *Colorado Co.* (4 *Dillon*, 263).

In *Atlee* v. *Potter* (4 *Dillon*, 581) it was held that the act requires the party to apply for the removal at the Trial Term; and

In *Whitehouse* v. *Ins. Co.* (2 *Fed. Rep.*, 498) it was said that the application is in time if it comes before the pleadings are completed or the next term following their completion.

In *Warner* v. *Sisson* (28 *N. J. Eq.*, 119) the Chancellor said:

"The cause was at issue, the testimony was closed, and the cause

regularly set down on due notice. It was incumbent on the petitioner to make his application at that term."

In *Pullman* v. *Speck* (113 *U. S.*, 84) the head note is:

"A suit in equity may be 'first tried' at the term of the State Court at which by the rules of that court the respondent is required to answer, and the complainant may be ordered to file replication."

See also *Gregory* v. *Hartley* (113 *U. S.*, 742).

It is evident, therefore, that Mrs. Carson's application was made at the proper term, and the enquiry arises—was it "before the trial thereof?"

What is a "trial?"

For the purposes of this case, this enquiry is answered by the Code of South Carolina, which, as has already been stated, provides (*Section* 275) as follows:

"A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact." *Section* 268: "A judgment is a final determination of the rights of the parties in the action."

The Act of 1875, does not use the word "hearing," which was found in the prior Removal Acts. It uses the word "trial" only; but such word, although technically descriptive of a submission for decision in a common law action, must be held to include the "hearing" of an equity suit, or otherwise such suit would not now be removable into the Federal Court.

What is a "trial" of an equity suit? Under the South Carolina Code, such a "trial" is defined to be "*judicial* examination of the issues between the parties," and by *Section* 290, it is provided that upon such a "*trial by the Court*, its decision shall be given in writing."

This, therefore, implies that the "trial" must be before a Judge acting as a Court, and by whom the "judicial examination of the issues" is to be made, and whose "decision" thereon is to be "in writing."

This view as to what constitutes a "trial" of an equity suit is sustained by the authorities.

In *Miller* v. *Tobin* (18 *Fed. Rep.*, 609) the Court said:

"'Trial' is a common law term, and is commonly used to denote that step in an action by which issues or questions of fact are decided. The Act of 1875, simply uses the word 'trial'—providing that the petition for removal of a cause shall be filed 'before the trial thereof,' whether it is an action at law or a suit in equity, and should be construed as only applicable to that step or proceeding in the progress of the case which results in a final disposition of it. * * Therefore, at any time before a trial of an issue of fact or law, which results in a final disposition of the case, and during the term at which such trial may be had, a party entitled to remove the same may file his petition and bond therefor with effect. See also the cases of Yulee *v.* Vose, 99 U. S., 544; Removal Cases, 100 U. S., 473, and Hewitt *v.* Phelps, 105 U. S., 395."

In *Thorne* v. *Towanda* (15 *Fed. Rep.*, 290) it was said:

"The act contemplates a trial in court, or at least a judicial trial of a binding nature."

In *Meyer* v. *Norton* (9 *Fed. Rep.*, 436) it was said:

"A trial must be such a proceeding as may give the Court where it is the right to determine that litigation, and enter a judgment which will for that Court and in that proceeding be a final determination of the rights of the parties to the issue."

In *Lewis* v. *Smythe* (2 *Woods*, 117) the Court said:

"The petition for removal must be filed before the trial commences. The filing of such a petition during the trial while it is in progress is not a filing before the trial. Blackstone defines a trial to be 'the examination of the matter of fact in issue in a cause' (4 *Black. Com.*, 322). As the petition and bond for the removal of this cause were not

filed until after the parties had entered upon the trial, and until after the pleadings had been read, and the evidence submitted to the Court, they were not filed in compliance with the statute. Whenever the investigation of the facts of the case, or the facts in connection with the law, is entered upon by the Court alone, or by the Court and a jury, the trial may be said to have begun."

In *U. S.* v. *Curtis* (4 *Mason*, 232) the Court said:

"A trial has been held to be the examination before a competent tribunal, according to the law of the land, of the facts put in issue in a cause, for the purpose of determining such issue."

In *Galpin* v. *Critchlow* (13 *Am. Law Reg., N. S.*, 137) it was said by GRAY, C. J.:

"A final hearing properly designates the hearing of a cause upon its merits by a judge sitting in equity."

In 2 *Abbott's U. S. Practice* (3*d Ed.*, 1877, *p.* 139) it is said:

"The judicial examination of the issues in a cause is usually denominated a 'trial,' when proceedings according to the course of the common law are had in view. The corresponding stage of a suit in admiralty or equity, is usually termed the 'hearing.'"

It is obvious, therefore, that to constitute a "trial" there must be—

1st. An issue.

2d. A grasping of such issue by a Court for the purpose of an examination and final decision thereof.

It has already been stated that Mrs. Carson's answer in the State Court to a complaint sworn to on the 15th day of October, 1879, did not, under the most severe rule, become due until the 4th of November; that the November Term of the Common Pleas commenced on the second Monday, the 10th of November; and that the issue, if it

had been joined by the service of Mrs. Carson's answer on the 4th of November, could not have been lawfully placed upon the calendar of the November Term by a previous notice of fourteen days before the commencement of the term to the clerk to docket the cause. The first term at which such notice could be legally given was the term which commenced on the second Monday of February, 1880, and the next term thereafter of the Common Pleas was appointed by law to be held on the second Monday of June, 1880.

Before issue was joined, and, on the 16th of December, the time for Mrs. Carson to answer, which is recited (*p.* 11) to have "expired"—but whether on that day or on some earlier one is nowhere shown—was extended, and by consent an order was entered referring it to a Master (*p.* 11) "to take testimony and report the same." This was before issue was joined, and, therefore, was not the commencement of the trial by any one.

Any inquiry as to facts not appearing in the record is not only not permissible under the rules of procedure in this Court, but is absolutely forbidden by the stipulation (*p.* 35) by which it is agreed :

> "That the preceding pages contain a true statement of this cause, and form the case, with exceptions, upon which it is to be heard in the Supreme Court,"

and that, whether this Court, or the Supreme Court of the State, were the Court referred to, as the record in the latter constitutes the only record which this Court can regard.

The answer (*p.* 35) was duly filed on the 31st of January, and the proceedings commenced before the Master (*p.* 15) on the 3d of February, and continued on the 6th. 16th and 27th of that month, when he made his report. The petition was filed on the 16th of February, 1880.

It is evident, therefore, that, on the 16th of February, no Court or Judge had grasped the issue for the purpose of a judicial examination and final decision, for on that date there was no issue joined. The proceedings were wholly *in fieri*, as in *Yulee* v. *Vose* (99 *U. S.*, 545), where the jury had been sworn as preparatory only to a trial; and the functions of the Master were precisely and only those of an examiner in an equity suit in the Federal Courts. By no proper use of language can this proceeding to take the proofs, *in preparatorio*, before a Master be said to bring the case within the rule as laid down by the Chief Justice in the *Removal Cases* (100 *U. S.*, 473) as follows:

"A case must be actually on trial *by the Court*, all parties acting in good faith, before the right of removal is gone."

On the 16th of February (*p.* 17) the plaintiff's counsel moved—

"that the Master file his report of the testimony taken in this case, as directed by the order of reference."

On the 27th of February (*p.* 14) the Master made his report, in which he said:

"This case was referred to me to take testimony and to report the same. * * I beg leave to file also with this report and testimony," etc.

It is obvious that the Master did not have, and did not assume to have, any judicial power to examine the issues,

which had not been framed when he was appointed or to finally judicially decide the same when formed,

The case (*pp.* 19, 21) came on for trial on the 25th of March before P. J. PRESSLEY, and immediately after the denial of Mrs. Carson's petition for removal. Her counsel then admitted the mortgage; the will of Edmund Hyatt; the qualification of the executors under the will in South Carolina, and a copy of the written submission of the parties in the former case of *Carson* v. *Robertson.*

The counsel for the plaintiff agreed to admit the conveyance made under the sale, in pursuance of the decree of the United States Court, and a record in the Ordinary's office of Charleston County.

It was also mutually agreed that the parties on either side had the right to refer to the testimony taken and found in the said record, filed as an exhibit by the defendant with her answer.

These admissions and papers were not found in the Master's report, and were supplementary thereto. It results, therefore, that all the evidence, upon which the parties relied, had not been put in before the Master acting as an examiner, and that both parties supplemented the Master's report by papers and agreements which had not been entered into or put in evidence before him.

It is clear, therefore, not only that the proceeding before the Master was not a "trial," but that it was a fragmentary and incomplete proceeding, which required to be supplemented by the plaintiff by admissions in evidence produced before P. J. PRESSLEY.

When the Master's report and this evidence were presented to P. J. PRESSLEY, the cause was for the first time on trial before a Court for the purpose of a judicial examination of the issues and of a final decision in writing thereon (*Smith* v. *Bryce*, 17 *S. C.*, 544; *Fields* v. *Hurst*, 20 *id.*, 296).

The findings of Judge PRESSLEY were filed (*pp.* 20–21) on the 30th of August, 1880.

The opinion of the Supreme Court of the State (*p.* 38) uses this language:

"The case came for hearing before Judge Pressley. * * Judge Pressley then proceeded to hear the cause on its merits, finally pronouncing a decree * * upon the findings; and this decree and judgment of foreclosure in favor of the plaintiffs was ultimately pronounced by the Circuit Court."

Almost the identical question involved in this case has arisen and has been decided in consonance with the views thus presented.

Section 46 of Chapter 121 of the General Statutes of Massachusetts is in these words:

"When a cause is at issue in any Court, whether the form of the action be contract, tort or replevin, the Court may, in their discretion, appoint one or more auditors to hear the parties and examine their vouchers and evidence, state accounts, and report upon such matters therein as may be ordered by the Court, and the report shall be *prima facie* evidence upon such matters only as are expressly embraced in the order."

This statute gave a *quasi* judicial power to the auditors, and made their report *prima facie* evidence of the subjects matter which were referred to them, on behalf of the party in whose favor the report was made.

In *Stone* v. *Sargent* (129 *Mass.*, 503) the defendant answered; the case was referred by consent, and a rule under this statute, to an auditor, and a hearing was had before him, and he made his report. Afterwards a petition to remove the suit into the Federal Court was filed. The Court said:

"The hearing before an auditor who determines nothing finally, but whose report is, by the general statute (*c.* 121, § 46), only *prima facie* evidence upon a subsequent trial before the Court or jury, is not a trial within the meaning of the Acts of Congress. A consent to the appointment of an auditor is no waiver of a right to remove before trial under the United States Revised Statutes, § 639."

The Section thus referred to was the Local Influence Act, which provided that a petition might be filed at any time before the trial or final hearing of a suit.

In the Pennsylvania Statutes, there is a subdivision entitled "Of Compulsory Arbitration," the material provisions of which are as follows:

"*Sec.* 10. It shall be lawful for either party in any civil suit or action, his agent or attorney, to enter at the prothonotary's office a rule of reference, wherein he shall declare his determination to have arbitrators chosen on a day certain, to be mentioned therein, not exceeding thirty days thereafter, for the trial of all matters in variance in the suit between the parties.

Sec. 24. As soon as the arbitrators shall have heard the evidence and allegations of the parties, they shall proceed to determine the matters in controversy submitted to them, and they shall make out their award, which shall be signed by all or a majority of them, and shall transmit the same to the prothonotary within seven days after they shall have agreed upon the same.

Sec. 28. Every award so entered shall have the effect of a judgment, with respect to the party against whom it is made, from the time of the entry thereof, and shall be a lien upon his real estate until reversed upon appeal, or satisfied according to law.

Sec. 33. Either party may appeal from an award of arbitrators to the Court in which the cause was pending at the time the rule of reference was entered, * * under the following rules and regulations:

1. Party appellant shall make an oath or affirmation that it is not for the purpose of delay such appeal is entered, but because he firmly believes injustice has been done.

2. Such party shall pay all the costs that may have accrued in such in such suit or action.

3. Shall enter into the recognizance hereinafter mentioned.

4. Such appeal shall be entered and costs paid, and recognizance filed, within twenty days after the award of the arbitrators."

These sections, in connection with the question involved in this case, came up for examination in *Thorne* v. *Towanda Co.* (15 *Fed. Rep.*, 289), where the Court said:

"This action, originally brought in the Court of Common Pleas of Bradford County, was removed to this Court by the plaintiffs. The defendant asks to have the suit remanded to the State Court, upon the ground that, before the petition for removal was filed, the plaintiffs had entered a rule of reference, under the State compulsory arbitration law, and the case had been tried before a board of arbitrators, and an award made against the plaintiffs, who appealed from the award to the Court of Common Pleas. The cause was not at issue, or triable in Court, when the rule of reference was entered, and that state of things continued when the petition to remove was filed. Therefore, the single question presented for solution is, whether the plaintiffs lost their right to remove the suit by reason of the rule of reference and the trial before and award by the arbitrators. The Act of Congress provides that the petition for the removal of a suit shall be filed in the State Court 'before or at the term at which said cause could be first tried, and before the trial thereof.' Was the proceeding before the arbitrators a 'trial' within the meaning of the act? I think not. The act, it seems to me, contemplates a trial in Court, or at least a judicial trial of a binding nature. But under the Pennsylvania statute a trial before arbitrators, under a compulsory rule of reference, is, in the first place, a trial out of Court (*Troubat and H. Pr.*, § 2231). Such rule may be entered before the cause is at issue, and even before the

return day (*Henness* v. *Meyer*, 4 *Whart.*, 358), and the effect of the appointment of the arbitrators, and commitment of the case to them, is to deprive the Court temporarily of jurisdiction to try the cause (*Camp* v. *Bank of Oswego*, 10 *Watts*, 130). And then, again, the award, when made, is conclusive only by the mutual acquiescence of the parties. Either side may appeal, and thereupon the jurisdiction of the Court re-attaches fully. Surely a procedure so anomalous—so barren of results—is not a trial within the purview of the Act of Congress. That the rule of reference here was entered by the plaintiffs is, I think, an immaterial circumstance. If the defendant was not precluded from removing the suit, neither should the plaintiffs be. They waived no legal right by availing themselves of the privilege of compulsory arbitration under the statute. The motion to remand must be denied."

The views thus presented seem to be sustained by the decision in *Hess* v. *Reynolds* (113 *U. S.*, 73). In that case the plaintiff in error prosecuted a claim in the Probate Court, which was resisted, and in due course of proceedings was referred to commissioners appointed by the Probate Judge. This Court said:

"It is said, however, that the trial spoken of had taken place before the Commissioners of Ionia County, to whom the case had been referred; but we do not look at that proceeding as a trial, within the meaning of the statute. It was merely a report, subject to be confirmed or rejected by the Probate Judge, and, by the express terms of the statute, subject to the right of appeal to a Court in which a trial by jury could be had. The latter was the trial or final hearing of the suit which would conclude the right of removal, and, until such trial commenced, the right of removal under this provision remained."

So also in *Ex parte Fiske* (113 *U. S.*, 713) the Court draws a distinction between taking a deposition and a trial in these words:

"The mode of producing testimony under the New York Code is not oral testimony and examination of a witness in open Court within the meaning of this Act of Congress. This obviously means the pro-

duction of the witness before the Court at the time of the trial and his oral examination then, and it does not mean proof by reading depositions, though those depositions may have been taken before a Judge of the Court, or even in open Court, at some other time than during the trial."

See also *Pacific Railway Removal Cases* (115 *U. S.*, 1).

It results, therefore, that the Court below was in error:

1. In refusing to accept Mrs. Carson's petition and bond, and in "proceeding further in such suit."

2. In assuming jurisdiction to raise an issue under such petition. and to try and to dispose of the same upon evidence *aliunde.*

3. In assuming that Mrs. Carson's unsigned and unverified answer was of the dignity of a record, importing absolute verity, and overcoming the positive allegation of citizenship in her petition.

4. In using the alleged admission of the answer and exhibit as evidence against Mrs. Carson.

5. In construing the answer as a record admission of her citizenship in the State of New York.

6. In holding that the petition and bond were not presented until after the trial of the suit in the State Court had commenced.

7. In holding that the affidavit annexed to the petition was insufficient, and that the petition was not properly verified.

And for such errors, the judgment and decree should be reversed, and the cause remanded under the writ of

error to the Circuit Court, to be proceeded with in that Court under a like order as was made in *Relfe* v. *Rundle* (103 *U. S.*, 226).

CLARENCE A. SEWARD,
JAMES LOWNDES,
Of Counsel for Mrs. Carson.

New York, March, 1886.

Office Supreme Court U. S.
FILED.
APR 9 1886
JAMES H. McKENNEY.
CLERK.

118-279

SUPREME COURT U. S.

OCTOBER TERM, 1885.

NOS. 245 AND 462.

CAROLINE CARSON, PLAINTIFF IN ERROR,

vs.

MARY E. HYATT ET AL., DEFENDANTS IN ERROR.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

1

CAROLINE CARSON

vs.

MARY HYATT ET. AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

2

This is the third time that the questions involved in this case have been before this court.

1st. In 1873, when it was remanded for want of parties. *19 Wall., 94, 107.*

2nd. In 1878, *99 U. S., 567-573.*

This latter was an appeal from Judge Bond's decree of the 10th of May, 1878, which decreed.

3

"That the bonds of Elias N. Ball to Alexander Robertson and John F. Blacklock, described in the pleadings and secured

by the mortgage of Dean Hall, are valid, unsatisfied and subsisting securities, and that the debts secured thereby are due and payable to the complainant, and that the mortgage of Dean Hall, described in the pleadings, given by Elias N. Ball to secure the said bonds, is a valid, unsatisfied and subsisting mortgage securing the payment of the said bonds."

"That the entry of satisfaction made on the said mortgage
4 is null and void, and that the parties to this cause, in whose possession or control the said bonds or any of them and the said mortgage may be, do surrender them to the complainant, and that the same are her property."

"That the sum of $31,000, with interest thereon payable annually, from the 23d of April, 1863, is now due and payable on the said bonds to the complainant, and that the said sum is a lien and charge on Dean Hall plantation in favor of the complainant."

Leave was given to the parties in interest to redeem until
5 the 13th of August, 1878, and if the debt was not then paid "the equity of redemption of all the parties to this suit, and of Hyatt, McBurney & Co., in the said Dean Hall plantation be forever barred and foreclosed," and the property sold. If sold to an outsider, the bonds given to Mrs. Carson for her debt, were to be secured by a first lien on the property. Leave was given to her to buy, and if so, her debt was to be set off against the purchase money.

This decree was affirmed and the facts on which it was based are thus given by the supreme court, 99 U. S., p. 568,
6 viz:

"William Carson, of South Carolina, died in August, 1856, leaving a widow, Caroline, and two minor sons, William and James. He left considerable personal property, and a plantation known as Dean Hall. By his will he appointed Robertson and Blacklock his executors, and directed all his estate to be sold on such terms as they should deem proper. The proceeds, after the payments of his debts, were to be divided into three parts, to be held in trust by his executors. The interest of one-third was to be paid to the widow. The in-
7 terest of the other two-thirds was to be devoted to the education and support of the two sons until they should become of age. The principal was then to be paid over to them.

"The executors sold Dean Hall to Elias N. Ball, and took his bonds and mortgage for a part of the purchase money. In 1863, Ball sold the property to Hyatt, McBurney & Co., a firm consisting of Hyatt, McBurney, Gillespie, Hazletine and McGahan. The conveyance was made to Gillespie and McBurney. The firm paid for the property in Confederate treasury notes. Out of the proceeds Ball paid his bonds to Robertson, and took them up and discharged the mortgage. Blacklock, the other executor, was then absent from the country, and upon his return refused to recognize the transaction. Hyatt sold his interest in the plantation to the other members of the firm, and Gillespie and McBurney gave him a lien upon it to secure the payment of the purchase money. * * * 8

"As the sons of the testator came of age they transferred their entire interest in the estate of their father to their mother. She filed the bill to set aside the cancellation of the mortgage upon Dean Hall as fraudulent and void. * * * 9

"The executors sold the property to Ball in the spring of 1857 for $50,000. He paid $15,000 down, and gave his bonds for the balance, secured by a mortgage upon the premises, as before stated.

"The property was valuable and the amount due was well secured. The debt was payable only in lawful money of the United States, and the executors had no right to take anything in payment but such money or its equivalent. Such was the condition of things in the spring of the year 1863.

"The civil war was then flagrant in South Carolina. McBurney says, that having a large quantity of cotton on hand, and the city being blockaded, his firm 'were willing to change some of their investments into real estate until peace should be restored.' This was shrewd and wise. The sole currency then was Confederate money. The Dean Hall property lay invitingly before them, but was incumbered by a heavy mortgage for the benefit of the widow and the orphans. The plan was conceived of acquiring the title and getting rid of the mortgage, both by means of Confederate currency. They thus executed it: They gave Ball $100,000 in Confederate notes for the property, and took a conveyance from him. 10 11

They placed a part of the Confederate money in his hands, as McBurney says, 'to enable him to pay off his bonds to said executors and to satisfy said mortgage.*' Robertson received payment in this paper and therefore gave up the bonds, and as soon as he could get access to the record entered satisfaction of the mortgage. He invested the notes in Confederate bonds, which became utterly worthless at the close of the war.

12 "McBurney & Co., and the Carsons thus changed places. The former still hold the broad acres, while the latter have lost every dollar of their investment, so well secured at the outset upon the property. They became, as it were, the insurers of the fate of battles and of the result of war. There was evidently a plot. McBurney & Co. were its contrivers, Ball was their instrument, Robertson was their dupe, and the Carsons were the victims."

Mrs. Carson bought at the marshal's sale under the above decrees, for $5,200, and holds title from them dated the 29th

13 of November, 1879.

Hyatt was not a party to these proceedings, and after the decree by the supreme court, his heirs, &c., filed their bill in the state court, to foreclose the mortgage given him by his late partners.

Except some testimony which has no bearing on these questions, and to which we shall refer shortly, nothing was before the state court but what had been before the U. S. court. The same questions were before both courts. To the su-

14 preme court decree, no weight was given by the state court, and the results are exactly the opposite.

The question now before this court is, whether its decree shall be nullified by proceedings in the state court, instituted on the same facts by a different partner from those who were parties to the suit in the U. S. court.

15 The Hyatts strive to show that the cases are different. Their counsel say:

"The counsel for Mrs. Carson had again and again disclaimed any charge of moral fraud against Mr. McBurney and had rested their case purely upon legal grounds. But Judge Swayne brushes all this away and says almost sneeringly, as if in answer to this intimation: "*The bill charges fraud, conspiracy and spoliation. If the charge is untrue the bill should be dismissed.*" Then waxing warmer with the recital of Mrs. Carson's wrongs, he inveighs: "*There was evidently* 16
a plot. McBurney & Co. were its contrivers; Ball was their instrument; Robertson was their dupe; and the Carsons were the victims." *99 U. S., p. 570.* But in conducting the case, here at home, where the parties to it are all well known, it was clear to Mrs. Carson's counsel that no decision could be obtained in her favor which rested upon a charge of fraud against Hyatt, McBurney or McGahan, whose characters in the community were beyond suspicion. Mrs. Carson's counsel therefore in answering for her, wisely left out the defense of fraud altogether; and the allegation in the tenth 'exception,' 17
is undoubtedly correct, 'that in this case, in the state court, there was no question of fraud made in the pleading or raised in the evidence.' The appellant dared not make the issue because she could not maintain it."

This is very pretty rhetoric, marred, it is true, by its bombast. Is it not also self-contradictory? Be that as it may, if it is intended to mean that actual fraud was charged in the U. S. court, and not in the state court, it is an error.

18

None of the bills in the U. S. court charges *actual* fraud.

On p. 3 of the transcript, in McBurney vs. Carson, is Mrs. Carson's first bill—that of 11th August, 1866.

It does not charge actual fraud: only the payment by Ball of his bond in "illegal promissory notes issued in violation of the constitution of the United States," and that he did this through the aid and assistance of McBurney.

This bill was *dismissed* for want of parties.

On 13th June, 1874, Mrs. Carson filed a new bill (pp. 68, 71 of transcript, McBurney vs. Carson). Here the charge is 19
modified, for no longer is it that Hyatt, McBurney & Co. aided

Ball to pay his bond in "illegal promissory notes issued in violation, etc.," but that they aided him to pay the debt "in Confederate treasury notes."

On 10th October, 1876, Mrs. Carson filed a supplemental bill. See pp. 96, 99, same transcript. The charge in this is the same as in the last cited bill; and it is on this bill that the cause was tried in the U. S. court.

20 In all these bills even the ordinary and common charge of combination and confederacy is omitted.

Mrs. Carson's answer to the Hyatt's bill is before the court (Tr., pp. 8–11), and says the same thing in different words.

But the quotation from Judge Swayne, separated from the context, misrepresents both him and the decree of the supreme court. For he immediately goes on:

21 "IF THE CASE STOPPED HERE WE COULD NOT HESITATE AS TO WHAT OUR JUDGMENT SHOULD BE. BUT IN ITS STRICTLY LEGAL ASPECT IT IS EQUALLY FREE FROM DOUBT.

"In *Ward* v. *Smith* (7 Wall. 451), this court held that a valid payment could not be made to an agent in the Confederate States during the rebellion in anything but lawful money of the United States, or bank-notes of the current value of their face, without the consent of the creditor.

"In *Horn* v. *Lockart* (17 id. 570), an executor had sold property, invested the proceeds in Confederate bonds, and his
22 conduct had been approved and ratified by a decree of the probate court. It was held by this court that the investment was void, that the decree of the probate court was a nullity, and that the executor was liable to the distributees in good money for the full amount involved.

"In *Frets* v. *Stover* (22 id. 198), in its most prominent features, is not unlike the case before us. There, a citizen of Pennsylvania, just before the breaking out of the war, took the bond of a citizen of Virginia, secured by a deed of trust upon real estate. The attorney of the creditor was the
23 trustee in the deed. During the war the attorney received payment in Confederate notes, and Virginia bank-notes of

no greater value, the entire capital of the bank having been converted into Confederate bonds. After the close of the war the creditor sued for his debt. The court adjudged that the transaction between the attorney and the debtor was illegal, fraudulent, and void, and decreed the enforcement of the bond and deed of trust." (*99 U. S. 571 s.*)

24

The only testimony in this cause, not in the United States court, is that of Riggs and DeLeon, (p. 16 trans.,) that Robertson might have invested the Confederate notes in

City of Charleston stock at. 132
Greenville and Columbia Railroad bonds. 150
Charleston and Savannah Railroad bonds. 140
Northeastern Railroad bonds . . . . . 127½—130

"After the war City of Charleston 6 per cent. stock varied from 50 to 70 cents and upwards on the $1." 25

"All securities were at a premium in Confederate currency at that time."

If the breach of trust was, as this court has fixed, the receiving of Confederate money for a gold debt; we do not see the relevancy of this testimony. But if it shows anything, it shows how serious was the breach of trust when the acceptance of the Confederate notes involved a loss in value, in the most favorable circumstances, of one-third of the amount—of some $10,000 of the $31,000 due, and then a further loss after the war of about a half to a third of this. 26

This issue being the same and the facts the same; the decisions of the two courts may well furnish material to those who sneer at the law as a science and dwell on its uncertainties.

27

UNITED STATES COURT.	STATE COURT.
It was fraud to pay a gold debt with Confederate treasury notes and to satisfy the mortgage on such a payment.	There is not a shadow of fraud either in the circumstances attending the said satisfaction or the nature of the payments.
28 The satisfaction entered by Robertson on Ball's bond held by the trustees of Carson and on the mortgage securing it, is a nullity, and the bond is due and the mortgage is a valid first lien on Dean Hall.	The satisfaction by Robertson on Ball's bond is a good satisfaction and the mortgage to Hyatt by his partners, McBurney & Co., is the first lien on Dean Hall.
29 Hyatt has, as a second mortgagee, but an equity of redemption and it is barred.	Hyatt has a first mortgage on the property. He is entitled to the proceeds of sale ahead of all other claims.
That Dean Hall be sold and the proceeds applied to the payment first of the Ball bond held by Mrs. Carson and secondly to the debt to 30 Hyatt.	That Dean Hall be sold and the proceeds applied to the payment of the debt due by Hyatt's late partners to Hyatt.

It is useless at this day to show that the United States courts hold the mere payment of a gold debt to a trustee or executor with Confederate treasury notes is in itself a fraud.

31 Such notes were never legal tenders in the Confederate States and were not money legally.

"Confederate currency was not *money in a legal sense*, and therefore receiving Confederate currency at a nominal value was *not payment* in a legal sense. In legal contemplation Confederate currency was a mere commodity. * * * Confederate currency was not at the time (1861, p. 470,) worth its nominal value, and therefore could not properly be taken at such value."

Singleton vs. Lowndes, 9 S. C., 490. 32

"A commodity, not money."

Planters' Bank vs. Union Bank, 16 Wall, 502.

Cf. Bissell vs. Heyward, 96 U. S., 587.

What is the fraud attributable to Hyatt, McBurney & Co.?

Whether they committed *actual* fraud or not, is of no 33
moment. They have done that which both the United States and South Carolina courts have declared to be fraud in a *legal* sense, and which so far as its effect on Mrs. Carson's rights is concerned, might just as well have been actual fraud.

In *Gibbes vs. Cobb, 7 Rich. Eq., 65*, Ch. Job Johnston for the South Carolina court, says:

"It has always been the law * * that it is fraud in any party, whether party to the instrument or stranger, to do any act going to frustrate or defeat the rights created by 34
or arising under a deed of which he is cognizant; and the *act done by him is set aside for that fraud, and the deed declared unaffected by it.*"

Hyatt & McBurney and their partners knew the bonds of Ball were to Robertson & Blacklock, "executors of the last will and testament of Wm. A. Carson." (*Tr. McB. v. C., p. 39, Appendix.* [redacted] This was notice of the will and of its contents, viz: that after payment of the debts of the estate, the executors held the portions going to Mrs. Carson and her sons as trustees, and not as executors. 35

"Where a person has sufficient information to lead him to a

fact he shall be deemed cognizant of it." *Sugden Vendors, 1052.*

"Whatever puts the party on further enquiry is sufficient notice in equity." (*Calais vs. Van Pelt, 2 Black, 372.*

In South Carolina a creditor can sue an executor nine months after the death of the testator.

36 Col. Carson died in 1856. Hyatt & McBurney bought in 1863. Was it reasonable that they should not know that the debts were paid? That Robertson & Blacklock were acting as trustees? But we are not left to mere supposition. The accounts in the ordinary's office, examinable by any one, and easy of access, showed conclusively the debts were paid, and that these bonds of Ball were held by Robertson & Blacklock as trustees, and not as executors. (*Appendix* C.) B

They knew, further, that Ball's bonds, as given in 1857, were "executed with reference to the standard of value then exist-
37 ing in the United States," (*Fretz* vs. *Stover, 22 Wall, 204.*) and were legally payable only in gold and silver, or, if no exception thereto was specially made "in current bills which are *redeemable* at the counter of the bank *on presentation*, and pass at par." (*Ward* vs. *Smith, 7 Wall, 453.*)

To pay in "*mere commodities*," (Singleton *vs.* Lowndes, 9 So. Ca., 473)—worth nothing like par—worth in the latter part of April, when payment was made, $3.81 for $1. (*14 Stat. S. C., p. 280*)—an obligation redeemable only in gold and silver; was certainly to defeat "the rights of Mrs. Carson and her
38 children created by or arising under Ball's bonds, of which bonds, and of what pertained to them, Hyatt & McBurney were fully cognizant."

It was their duty to enquire of Mrs. Carson and of her sons if they consented to accept "these commodities" for gold when worth scarce a fourth of their debt. The slightest enquiry would have told them, if they did not know it before, that Mrs. Carson and William Carson were absent beyond the Confederate lines, impossible to be consulted, and that James Carson was an infant, unable to consent.

39

Moreover, Robertson's act, whether technically as exeeutor or even as sole trustee, (were he such,) was a waiver by a trustee of the rights of his *cestui que trusts* without valuable consideration and in behalf of a party (Hyatt, McBurney & Co.) who was aware of the equities of the *cestuis que trustent*, and as such is not sustainable in a court of equity.

Mayrant vs. Guignard, 3 Strob. Eq., 128.

40

The Hyatts strive to break the force of these accounts by arguing that it is illegal for an executor to pay a legacy within the year granted to them for the settlement of the estate. The state court glides smoothly over the point with: "this was within the year, and is premature." But it does not say it was illegal. It could not say this without reversing previous state decisions, and all previous law on the subject.

"This allowance (of a year in which to settle an estate), 41
however, to executors is merely for convenience in order that the debts of the testator may be ascertained, and the executors made acquainted with the amount of assets so as to be able to make a proper distribution of them. (*Garthshore vs. Chalie, 10 Vesey, 13.*) Therefore, if the state of the testator's circumstances be such as to enable the executors to discharge legacies at an earlier period, they have authority to do so."

Williams' Ex'ors, p. 994.

"I know," says Lord Eldon, "of no case which prevents executors, if they choose, from paying legacies or handing 42
over the residue within the year."

Augustine vs. Martin, 1 Turn. & R., 241.

Pearson vs. Pearson, 1 Sch. & Lef., 12.

The above is fully sustained by the South Carolina cases.

Thompson vs. Schmidt, 3 Hill, 165:

Which decides that the acts preventing executors from being sued for a year, is for the protection of executors, and they may waive its benefits. "An executor may not be sued for a legacy within nine months; but he may deliver it without being sued." (*Toller, 46.*) * * This legacy was given 43
"after the payment of debts," and it was argued that, therefore, the executor could not assent to it until all debts were

paid. *Curia.* "There seems nothing to distinguish such a legacy from any other. By law, whether the will says so or not, no legacy is deliverable until the debts are paid. But what follows? The executor may, if he please, deliver. He does so at his peril. As between the executor and the legatee the assent is valid. If creditors are injured, they may, in case the executor is irresponsible, pursue the legacy in the hands
44 of the legatee."

This is a matter of general law, and the decision in this case of the state court even if such as is contended by the Hyatts, does not bind the United States court.

Certainly at the time Robertson & Blacklock transferred the funds to themselves as trustees, this was the settled construction of the law given by the highest state court at the time the rights accrued, and to that the United States courts
45 will conform.

Gelpcke vs. DuBuke, 1 Wall, 175.
Taylor vs. Ypsilante, 105 U. S., 60.
Burgess vs. Seligman, 107 U. S., 20.
Boyce vs. Tabb, 18 Wall, 546.
Olcott vs. Supervisors, 4 Wall, 678.
Gibson vs. Lyons, 6 Sup. Ct. Rep., 132.

46 But further. Col. Carson died in August, 1856. The year for settlement of the estate was up in 1857. The purchase of Dean Hall by Hyatt, &c., was in April, 1863. This was of itself sufficient to show them that these bonds were held by Robertson & Blacklock as trustees, and not as executors.

"Where a sole executor sustains the two-fold character of executor and guardian, the law will adjudge the ward's proportion of the property in his hands to be in his hands in the capacity of guardian after the time limited by law for the settlement of the estate, whether the final account has been
47 passed by the orphan's court or not. *Watkins vs. State, 2 Gill. and J. 220.* So where the same person is executor of

an estate and guardian of a distributee, and there is nothing to show in which capacity he holds funds after payment of debts and settlement of the estate, he shall be presumed to hold them as guardian. *The State vs. Hearst, 12 Missouri, 365. See also Johnson vs. Johnson, 2 Hill S. C. Eq., 277; Karr vs. Karr, 6 Dana, 3.*"

Cavender vs. Cavender, 114 U. S., 472.

48

Such also is the doctrine in South Carolina, as shown by the case above cited.

Johnson vs. Johnson, 2 Hill Eq., 285.

Being trustees, the act of Robertson, without Blacklock's concurrence, was a nullity, and worked no discharge of the bond and mortgage.

Trustees must act jointly. They are not like executors, 49
where the act of one is, in most respects, the act of all. One of several executors can release a debt, for instance. (*Wm's, Ex'ors, s. p. 946, ss.*)

But with co-trustees this is very different With them even a receipt for purchase money must be signed by all of them. (*Lewin, Trusts, 449.*)

"They all form, as it were, but one collective trustee, and, therefore, must execute the duties of their office in their joint capacity. * * If any one refuse to join, it is not competent for the others to proceed without him; but the admin- 50
istration of the trust, in that case, must devolve upon the court.

"Thus, a receipt for money must receive the joint authentication of the whole body, and not of the majority merely, OR IT WILL NOT BE VALID." (*Lewin, l. c., 298.*)

Blacklock went further. He was then (at the date of sale. &c.) "absent from the country, and, upon his return, refused to recognize the transaction."

McBurney vs. Carson, 99 U. S., 568.

51

And it matters not, in this case, whether Robertson acted as executor or trustee.

Ib., p. 572.

But further, this court has decided, without any change,
52 that the payment to a trustee, executor or agent, of a gold debt with Confederate money is a nullity.

Ward vs. Smith, 7 Wall., 451.

Speaking of such payments it has said:
The attempted payment was "*a void act.*"

Fretz vs. Stover, 22 Wall., 207.

The acceptance of such payment by the agent is a "*fraud*" and is "*invalid.*"

Ib., p. 207.

53

The entire transaction is "*an absolute nullity.*"

Horn vs. Lockhart, 17 Wall., 581.

It was "*as if it were not—a mere nullity.*"

Hickman. vs Jones, 9 Wall., 201.

"It was "*utterly void and gave no rights, and took away none * * A caput mortuum and nothing can give it validity.*" "A thing void as to all persons and for all purposes, can derive no strength from confirmation."

54

Dewey vs. Perdicaries, 96 U. S., 195 and 196.

The mere receipt of Confederate treasury notes by a trustee or executor, for a gold debt constitutes "*fraud and spoliation.*'

Carson vs. Robertson, 99 U. S., 570.

Even payments of debts due to citizens of "loyal States," compelled by the courts of the Confederacy under its sequestration acts, do not discharge the debts.

Williams vs. Bruffy, 96 U. S., 182.

55

"Transactions which tend to impair the rights of loyal citizens, can never be upheld in any tribunal which recognizes

the constitution of the United States as the supreme law of the land." (Quoted with slight change in order of words.)

Stevens vs. Griffith, 111 U. S., 52.

EFFECT OF DECISION IN McBURNEY vs. CARSON ON HYATT'S PRESENT SUIT.

56

Hyatt was a partner of Hyatt, McBurney & Co., at the date of the purchase of Dean Hall from Ball. As such partner he acquired his interest.

He was a party to the fraud by which the plantation was got and Mrs. Carson's rights destroyed. He sells his interest thus got by fraud to his *particepes criminis* and they mortgage it back to him.

57

As a partner of Hyatt McBurney & Co. his equity of redemption in Dean Hall is barred. (*Supra, p.* 2.)

Mrs. Carson holds this plantation under an authority derived from the United States under the decree in *McBurney vs. Carson, 99 U. S., 567*, declaring her mortgage a first lien, and the purchase by Hyatt and his partners fraudulent as against her.

The state supreme court has nullified and set aside this decree and declaring Mrs. Carson has no lien—not even a second lien—orders the property to be sold for the benefit of Hyatt and his partners.

58

The party to the fraud is to be benefitted by the fraud.

But can the decree of the supreme court U. S., be thus nullified?

It is a matter of regret to Mrs. Carson's counsel that they failed to command the attention of the supreme court of South Carolina.

Else its decree would have said nothing about *res adjudicata* or about the whole people of the Confederacy being steeped in fraud if payment in Confederate money marks such.

59

No contention of either kind was made.

Payments in Confederate money to persons *sui juriss* are one thing. Payment of gold debt in such money to trustees or executors or agents when those beneficially entitled had left the Confederacy to avoid the war or were too young to assent, are different.

The court of South Carolina has held trustees, &c., responsible for receiving such.

60 Mrs. Carson's counsel, adopting substantially the language of the supreme court, U. S., claimed only that the effect to be given to the decree in McBurney vs. Carson, was:

"Such effect as would belong to judgments of courts of this (So. Ca.) state, rendered under similar circumstances."

DuPasseur vs. Rochereau, 21 Wall., 135.

And if in the Hyatt case, as in this cited case, an entirely new element (defect in recording) had been introduced, it would not have been binding.

61 But no new element was introduced, and the state court has refused "to give effect to the judgment of (the supreme) court of the United States, rendered upon the point in dispute, and with jurisdiction of the case and of the parties."

DuPasseur vs. Rochereau, 21 Wall., 135.
Embry vs. Palmer, 107 U. S., 8 ss.

Is it conceivable that if the state court had made the decree in McBurney vs. Carson (99 U. S., 567), and, on the faith of that decree, Mrs. Carson had bought Dean Hall, it would have, in a few weeks later, with no new material fact before
62 it, have changed the result and dispossessed Mrs. Carson? No such instance is, we fancy, on record with any court. It certainly can not be said that the state court has treated the decree of the supreme court as conclusive on the issues before it, except for such causes as would be sufficient to set aside the judgment, if made by itself.

McElmoyle vs. Cohen, 13 Pet., 326.

63

A right held by Mrs. Carson, under authority of the U. S. court, is set aside by the decree of the highest court in South Carolina and nullified. This brings the case before this court.

Dooley vs. Smith, 13 Wall., 604.
Turnbull vs. Payson, 95 U. S., 423.
Murray vs. Charleston, 6 Otto, 432.
Beer Co. vs. Massachusetts, 7 Otto, 541.

64

And being here, this court must *re-examine* and reverse, affirm or modify it, as if it were made by a circuit court of the United States.

And that, too, without the restriction of the former closing clause of the act of 1789.

Stewart vs. Hahn, 11 Wall., 496.
Murdoch vs. Memphis, 20 Wall., 590.

And for this purpose will go into "the merits of the case." 65

New Orleans vs. DeLamore, 114 U. S., 506.
Hanley v. Donoghue, 6 Sup. Co. Rep., 244.

"And if it was erroneously decided against the plaintiff in error * * and the issue raised by the question of Federal law is of such controlling character that its correct decision is necessary to any final judgment. * * Then this court will reverse the judgment of the state court and will render such judgment here as the state court should have rendered, or remand the case to that court as the circumstances of the case may require." 66

Murdoch vs Memphis, 20 Wall, 636.

"The power to prescribe what effect shall be given to the judicial proceedings of the courts of the United States is conferred by other provisions of the constitution, (i. e., than Art. iv, §1—the like faith and credit clause viz:) by such as those which declare * * the supremacy of the authority of the national government within the limits of the constitution 67
As part of its general authority, the power to give effect to

the judgment of its courts, is co-extensive with its territorial jurisdiction."

Embry vs. Palmer, 107 U. S., 9, 10.
DuPasseur vs. Rochereau, 21 Wall, 134.

68 As illustrating our contention, we refer to the following cases:

Christmas vs. Russell, 5 Wall, 290.

Christmas, was a citizen resident of Mississippi. He owed Russell $—— by a note dated March, 1840, and it was by the statute of Mississippi barred in 1847. He went to Kentucky in 1853, on a visit to some friend. Was there sued by Russell. Judgment went against him and on this judg-
69 ment Russell sued him in Mississippi.

Christmas pleaded the statute of limitation and that the judgment was obtained by fraud and that it had been instituted in Kentucky to avoid the laws of Mississippi.

The state court decided for the plaintiff and the defendant carried the case to the U. S. sup. ct.

The judgment was there affirmed. "Where the jurisdiction has attached, the judgment is conclusive for all purposes and is not open to any inquiry upon the merits. Speaking of the before mentioned act of congress, Judge Story says it
70 has been settled upon solemn argument that that enactment does declare the effect of the records as evidenced when duly authenticated. * * "If a judgment is conclusive, in the state where it was pronounced, it is equally conclusive everywhere in the courts of the United States.

In this case the suit was between the same parties and therefore except for the general principle not applicable to our case.

Green vs. Van Buskirk, 5 Wall, 309.

71 Was not between the same parties.

Bates owned certain safes at Chicago. He mortgaged them

to Buskirk in New York. The mortgage was not duly recorded in Illinois and possession was not delivered to Buskirk.

Green attached the safes in Chicago, sold them and received the proceeds.

Buskirk sued Green in New York for these proceeds. He pleaded the proceedings in Illinois. The court in New York disregarded them, and gave judgment against Green.

He took a writ of error, and on motion to dismiss the writ 72
the U. S. supreme court held him entitled to it, and said:

"It is said (p. 311) that Van Buskirk, being no party to the proceedings in Illinois, was not bound by them, but was at liberty to assert his claim to the property in any forum that might be open to him; and, strictly speaking, this is true. He was not bound by way of estoppel, as he would have been if he had appeared and submitted his claim, and contested the proceedings in attachment. He has a right to set up any title to the property which is superior to that conferred by the attachment proceedings, and he has the further right to 73
show that the property was not liable to attachment—a right from which he would have been barred if he had been a party to that suit."

The decision was in favor of Green. (Same Case, 7 Wall, 139.)

Rochereau vs. DuPasseur, 21 Wall. 130:

DuPasseur had a first mortgage on Sauvé's land for purchase money, but had failed to record it according to law; he foreclosed it in the United States circuit court, got judgment, 74
and bought in the land. Rochereau was not a party to this suit. Rochereau also held a mortgage on the same land, but second in point of date. He foreclosed it as against DuPasseur as tenant in possession. The state court held that, on account of the defect in the recording of DuPasseur's mortgage, Rochereau's though second in point of time had precedence in rank.

The supreme court held that it had jurisdiction.

"Then was Rochereau a subsequent mortgagee to DuPasseur. Was the latter entitled to priority? If so, Rochereau 75
would be bound by the judgment, *though not made a party.*"

The court, however, held, the point of recording *had not been before it in the former suit*, and in this respect followed the state court.

But all matters decided in the former suit, though Rochereau was not a party, could not be reopened.

Factors vs. Murphy, 111 U. S., 738:

76 Cook & Vairin made a mortgage of real estate to secure certain notes.

Murphy held two of these notes. Cook & Vairin had been declared bankrupts, and, by certain proceedings in bankruptcy, the mortgaged land had been sold free from incumbrances. It did not bring the debt, and the plaintiff in error bought it in for all holders of notes (p. 740).

Murphy claimed she was not "a party to the proceedings, and had no notice of it," and "the order was (therefore) not binding on her" (p. 740).

77 Murphy brought suit in the state court of Louisiana, claiming that by the sale in bankruptcy, the lien of all the note-holders, except herself, had been extinguished, and that the buyers were "liable to her for the amount of these notes, with a first lien on the property" (740).

The Louisiana court held that "Murphy was not a party to the proceeding in bankruptcy, and was in no sense bound by the sale of the mortgaged property, but that the sale had the effect of extinguishing and satisfying all the liens on the property but hers, and left her notes the only lien on it," * * 78 and ordered that unless the Factors, &c., paid her debt, the property should be sold for such payment.

On error, the supreme court held that Murphy was not a party to the proceeding in bankruptcy, and "that she was at liberty to * * ratify the sale" or to proceed in her own way to subject the property to payment of her debt, which she has done, by the foreclosure suit now on review" (742).

But she can't then claim the property exclusively. The proceeds "must be brought into court and distributed among the lien holders, *according to their priorities.*"

79 "*If Mrs. Murphy chooses to assert her lien and demand a new sale of the land, let her have it, but it must be subject to the rights of all parties as they stood before the other sale.*" (743.)

And this was the decision of the United States supreme court, though the decree of the Louisiana court was "*based by that court upon the doctrine of confusion found in the Civil Code of that state.*"

But the United States supreme court refused to be bound by the state law, and decreed:

"That while Mrs. Murphy is not precluded by the judicial sale, under the order of the bankruptcy court, from foreclos- 80
ing the mortgage for her notes, neither are the parties who took part in that proceeding barred of the right to set up their liens, as they existed before that sale, and share in the proceeds of the new sale accordingly; and, so far as the expenditures of the insurance company, in payment of taxes and prior liens, and in improvements necessary to the prevention of loss and deterioration in the property, were required for the benefit of all the lien holders, it is to be first paid out of the proceeds of the sale, and plaintiff in error should account for rents and profits, if there were any." (p. 745.) 81

This case is fully confirmed by the recent case, decided May 1, 1885, of *New Orleans, vs. Delamore, 114 U. S., 501.*

Adopting the language of the United States supreme court, in *Green vs. Van Buskirk, 5 Wall, 507*, and *Factors vs. Murphy, 111 U. S. 733*, may we not say:

"It is said that Hyatt, being no party to the proceedings in 82
the United States circuit and supreme court, was not bound by them, but was at liberty to assert his claim to Dean Hall in any forum that might be open to him; and, strictly speaking, this was true. He was not bound by way of estoppel, as he would have been had he appeared and submitted his claim and contested the proceedings for foreclosure. He has a right to set up any title to Dean Hall which is superior to that conferred on Mrs. Carson by her purchase in the suit to foreclose Ball's mortgage to the executors of Carson for the purchase money. He has the further right to show that the 83
property was not subject to the mortgage—a right from which

he would have been barred if he had been a party to that suit —and in any case to demand a resale.

But in all other matters involved in the case, Hyatt is concluded; for, holding a title subject to the incumbrance of Ball's mortgage, he is concluded by everything which, in the cause in the United States circuit and supreme courts, was decided on the merits. That judgment being conclusive in the United
84 States courts on those points, is equally conclusive everywhere in the courts of any of the United States.

THE REAL MERITS OF THE CASE.

No impartial person can fail to see that this suit is not solely for its ostensible purpose—the recovery of a debt—nor
85 is it between the Hyatts and Mrs. Carson. Judge Pressley's decree, gave them practically a double remedy; against their real debtor, McBurney, &c., a speedy and quick remedy; and in case this failed a right to go against Mrs. Carson's property. A short reference, McBurney being the witness, would have settled this.

But it is not called.

Why? Because McBurney the debtor can pay the debt. Because the remedy against him is perfect.

Resort is had to the tedious process of an appeal to set aside
86 Judge Pressley's decree.

Why? Because the primary subject of the suit is clearly, not to recover the debt, but to force Mrs. Carson to pay McBurney's debt.

The litigation is between McBurney and Mrs. Carson. It does not affect the Hyatts. Judge Pressley ordered them to be paid in any case. Why, then, should they appeal from his decree? It is not easy to see why for their own sakes they objected to the decree. It is easy enough to see why, for the purpose of protecting McBurney at the expense of
87 Mrs. Carson, they should complain of that which refused them so inequitable a claim.

And does this commend this suit to a court?

If Mr. McBurney is angered by Judge Swayne's remarks, charging him and his partners, Hyatt included, as he claims with actual fraud, as the contriver of a plot to victimize the Carsons: (*99 U. S., 571,*) does that give him or them the right to use a court—for what?

Either to get indirectly what he cannot get directly, or to punish Mrs. Carson for her supposed agency in bringing forth this condemnation of himself and partners. 88

Of this case, as in *Factors vs. Murphy, 111 U. S., 741,* must this court not say:

As regards the merits, "it is impossible to shut our eyes to the injustice of the decree."

Hyatt's title—one and the same with the title of Hyatt McBurney & Co.—founded in a fraud against the Carsons, is upheld, and to them is awarded "the broad acres while the latter (without fault or laches of their own) have lost every 89
dollar of their investment, so well secured at the outset, upon the property." (99 U. S., p. 571.) They who left the Confederacy from the first, because their sympathies were not with it, or were mere infants, are made "as it were the insurers of the fate of (its) battles." (99 U. S., 571.)

As Ch. J. Chase says, in *Shortridge vs. Mason,* 2 Am. Law Rev., 95:

"Those who engage in rebellion must expect the conse quences. If they succeed, rebellion becomes revolution, and the new government will justify its founders. If they fail, all 90
those acts hostile to the rightful government, are violations of law, and ORIGINATE NO RIGHTS WHICH CAN BE RECOGNIZED BY THE NATION WHOSE AUTHORITY AND EXISTENCE HAVE ALIKE BEEN ASSAILED."

But by all means let these consequences be restricted to those who did engage in secession, and do not let Confederates complain when these consequences come to them personally.

91

AS TO THE REMOVAL.

Statement of Facts.

There is nothing in the record to show when the bill was filed, but it was presumably not filed before the 15th of October, 1879, the date of the affidavit annexed to it. (fol. 117.)

92 There is nothing to show that service of process was ever effected, but there was an appearance by Mrs. Carson's counsel on the 16th of December, 1879. (fol. 22.) It was then ordered that Mrs. Carson have until January 24, 1879, to file her answer. (ibid.) It was in fact filed on January 31, 1880. (fol. 62.)

On the 16th of February, 1880, before the trial of the cause by the state court a petition was filed by Mrs. Carson by her counsel, praying a removal of the cause to the circuit court of the United States, on the ground that there was in it a con-
93 troversy wholly "between citizens of different states, and between a citizen of a state and foreign state, namely between the plaintiffs and Mrs. Carson, which can wholly be determined as between them." The petition alleges that the plaintiffs were citizens of New York or Spain, and that Mrs. Carson was a citizen of Massachusetts. (fol. 23). The requirements of the act of March, 1875, were fulfilled.

On March 25, 1880, the state court made an order refusing to remove the cause, (fol. 33) and proceeded with the trial.

The answer of Mrs. Carson set up two defences:

94 1. That her trustees in surrendering the bonds and satisfying the mortgage for Confederate treasury notes had committed a breach of trust: that Hyatt had procured the breach of trust to be committed and had taken his mortgage with full notice of her equities.

2. That the judgment of the United States court rendered in the former suit against the other partners of Hyatt, McBurney & Co., was a bar to the action.

A decree of foreclosure was made by the state court and affirmed by the supreme court of the state. The writ of
95 error in No. 245 was sued out to reverse this decree.

Between the filing of the petition and the decree, viz: On

the 8th of March, 1880, a transcript of the cause was filed by Mrs. Carson in the circuit court of the United States for the district of South Carolina, and the requirements of the act of March 3, 1875, were otherwise complied with. (Rec. 462.)

On the 10th of December, 1881, Mrs. Carson moved for leave to amend her answer by striking out so much thereof as alleged her domicile in New York, averring therein that she was a citizen of Massachusetts. (fol. 7). The affidavit of 96
James Lowndes, her counsel, averred that Mrs. Carson knew nothing about the answer when it was filed, and as soon as she knew of it called attention to the mistake as to her citizenship; that Mrs. Carson had not resided for ten years (before November 28, 1881), in New York, and had been continuously beyond sea since the Autumn of 1877. (fol. 8, 9). The affidavits of Robert Winthrop, and Mrs. Dewey as to the fact of Mrs. Carson's citizenship in Massachusetts were also filed. (fol. 10). Leave was refused.

On December 31, 1881, the circuit court on motion of the 97
plaintiff's, remanded the cause to the state court. (fol. 12).

The appeal in 462 was taken from this order.

ASSIGNMENT OF ERROR IN NO. 245.

1. The state court erred in taking jurisdiction and proceeding with the cause after the filing of the petition for removal.

2. The state court erred in not giving effect to the judg- 98
ment of the U. S. circuit and supreme courts.

ASSIGNMENT OF ERROR IN NO. 462.

1. The circuit court erred in remanding the cause to the state court.

99

THE QUESTION OF REMOVAL IN THE STATE COURT.

The cause was duly removed to the circuit court of the United States on the filing of the petition for removal on the 16th of February, 1880, and thereafter the state court was
100 without jurisdiction.

Under the act of March 3, 1875, a cause in a state court is ipso facto removed to the United States court by the filing in the state court, at the term at which the cause could first be tried and before the trial, of a petition for removal setting forth a ground for removal named in the act and by the performance of the formalities prescribed by the act.

It is settled by many decisions that the state court is divested of its jurisdiction ipso facto by the fulfillment of the
101 requirements of the statute, and that no order of the state court is necessary to operate this result.

"If the cause is removable and the statute for its removal has been complied with, no order from the state court for its removal is necessary to confer jurisdiction on the court of the United States, and no refusal of such order can prevent the jurisdiction from attaching. When the prerequisites for removal have been performed, the paramount law of the land says that the case shall be removed and the case and the *res* both go to the federal court.

102 "When a case has been properly removed from a state into the United States court and the state court still goes on to adjudicate the case against the resistance of the party at whose instance the removal was made, such action on its part is a usurpation."

Kern vs. Huidekoper, 103 U. S., 409.
Steamship vs. Tugman, 106 U. S., 122.

It appears also from the above cited cases and others that the removal results from the allegations of the petition; that
103 those allegations are not traversable, much less can be contradicted by other parts of the pleading. Under sec. 5, of

the act of March 3, 1875, the truth of the allegation in the petition is triable in the circuit court alone.

The law being thus, the effect of the petition for removal in operating a removal depends upon these facts:

I. Did it set forth a ground for removal within the statute?

104

II. Was the petition filed before or at the term at which the cause could be first tried?

III. Was it filed before the trial?

IV. Were the prescribed formalities fulfilled?

All these facts are shown by the record of this case to have existed.

105

I. THE PETITION FOR REMOVAL ALLEGED A GROUND THEREFOR UNDER THE ACT OF MARCH 3, 1885, VIZ:

That the plaintiffs were citizens of New York or Spain; that the defendant, the petitioner, was a citizen of Massachusetts, and that there was in the suit a controversy between the plaintiffs and the petitioner which could be wholly determined between them (fol. 23, 24).

It is conceded that the allegations of the petition were sufficient (fol. 86) but the court proceeded to try the allegation of the defendant's citizenship in Massachusetts, and without giving her any opportunity to adduce proof on that issue, but giving to the plaintiffs leave to read the answer as proof, decided the issue adversely to her.

106

It has been argued above that the court was bound to accept the allegations of the petition. But if it were otherwise, there is nothing in the answer to contradict the petition.

The circumstances under which the answer was filed and Mrs. Carson's ignorance of it are all shown in the record in

107

No. 462. But it appeared from the record in the present case that it was not signed by Mrs. Carson, and that her oath to it had been waived by the plaintiffs (fol. 22.)

The language of the answer relied upon to contradict the petition is this:

"The defendant, who during the late war adhered to the cause of the Union, early in 1861 left South Carolina and
108 went to New York, where she has ever since resided and had her domicile"

This is an averment as the domicile and residence. That residence is not equivalent to citizenship is settled by decisions of this court.

Robertson vs, Cease 96 U. S. 646.
Grace vs. American Co. 109 U. S. 284.

But not only was this averment accepted as evidence but it was treated as an estoppel. It seemed to be regarded as
109 proof which could not be contradicted. Certainly no opportunity of contradiction was allowed to the petitioner.

That the court could consider a ground of removal which was not alleged, has been held in several cases.

Ruckman vs. Ruckman 97 U. S. 646.
Osgood vs. The Railway Co. 6 Bliss 336.
110 *Norris vs. The Mineral Co. 7 Fed. Rep. 272 (Blatchford J.)*
Canal Co. vs. Hart. 114 U. S. 654.

Under the act of March 3, 1875, p. 2, any suit of a civil nature arising under the laws of the land or constitution of the United States is removable.

Mrs. Carson pleaded in bar of the plaintiff's action a former decree of the circuit court of the United States in a suit between herself and partners of Hyatt, McBurney & Co. She
111 also pleaded that decree as an estoppel of the issues in the present suit. (fol. 21) She also alleged that she had pur-

chased under the said decree the property against which the plaintiffs were seeking foreclosure. The case was one therefore arising under the laws of the United States.

In *Dupasseur vs. Rochereau 21 Wall.* 130 a title derived from a sale under a judgment of a United States court was held to be within the jurisdiction of this court.

The cases of *Insurance Co. vs, Murphy* (*111 U. S. 738*) and *New Orleans vs Delamore* (*114 U. S. 501*) hold that title de- 112
rived from a judgment of a United States court is a right or title held under the United States, and that this court has jurisdiction when such right or title is alleged to be impaired. So also a suit against a corporation created by the United States is a ~~clause~~ case "arising under the laws of the United States."

Railway Removal Case, 115 U. S. 1.

Mrs. Carson had therefore a right of removal independently of the question of citizenship. 113

II. THE PETITION WAS FILED BEFORE OR AT THE FIRST TERM AT WHICH THE CASE COULD BE TRIED.

Under sec. 3 of the act of March 3, 1875, a suit in equity may be "first tried" at the term of the state court at which, by the rules of that court, the respondent is required to answer and the complainant may be ordered to file replication. 114

Pullman Palace Car Co. vs. Speck, 113 U. S. 84.

The words "the term at which the case may be first tried" in the act of March 3, 1875, mean the first term at which the cause is triable, i. e., in which it would stand for trial had the parties taken the usual steps as to pleadings and other preparation.

Gregory vs. Hartley, 113 U. S. 742.

The petition for removal was filed in the state court at its February term, 1880, which was the first, at which the cause was triable. 115

There is nothing in the record to show when the complaint was filed. There is no process and no substitute for it. On the 16th of December, 1879, an appearance was entered for Mrs. Carson by counsel (fol. 22), and by consent further time was granted to answer until January 31, 1880, and there was then for the first time an issue to be tried.

116

The state court (the common pleas) has three terms beginning on the second Mondays of February, June and November.

Code of Procedure of So. Ca., p. 427. Ed. of 1870.

There is nothing in the record to show when the November term, 1879, ended. The order made December 16, 1879, is not entitled of any term.

117 Under the code of procedure of South Carolina any issue joined stands for trial at the next term occurring fourteen days thereafter.

"At any time after issue, and at least fourteen days before court, the plaintiff shall file in the clerk's office the summons and complaint in the cause, endorsing thereon the nature of the issue and the number of the docket upon which the same shall be placed; and if the plaintiff fail to do so, the defendant, seven days before the court, may file copies of said
118 papers, with a like endorsement, and the clerk shall thereupon place said cause upon its appropriate docket, and it shall stand for trial without any further notice of trial or note of issue."

(Act of 1873, amending code. sec. 13.)

If on the 31st of January, 1880, the last day to which it could possibly extend, November term, 1879, had ended there was no court to try the case. But whether it had ended or not, under the foregoing provisions, the case was not tri-
119 able until February term, 1880. The only doubt is whether it was even then triable, as fourteen days could not elapse

between the 31st of January and the 9th day of February, 1880, the second Monday of the month.

But further:

The result of the cases seems clear that the first term when a case is triable is that term when on the pleadings as they then stood, the "urging or pursuing party had a right to look for" a trial, in other words, to insist on a trial. 120

But if either party can object to a trial on the pleadings as they then stood, then such term is not the first term at which the case was triable.

Babbitt vs. Clark, 103 U. S., 612.
Harter vs. Kernochan, 103 U. S., 567.
Pullman vs. Speck, 113 U. S., 86.
Gregory vs. Hartley, 113, U. S., 746.

Van Vechten as executor of Hyatt was a necessary party. 121
"If there be *several* executors * they ought all to join, though some * * *have not proved the will.*"

1 Chitty Pleadings, p. 20.
Brookes vs. Stroud, 1 Salk 3.
Williams Exors., 1867.
Kilby vs. Stanton, 2 Yonge & Jer. 77
Gordon vs. Goodwin, 2 N. & Mc. (S. C.) 70.

Mrs. Carson, in her answer, pleaded that he was a necessary party plaintiff. (*Tr. p.* 11.)
And by order filed 6th March, 1880, he was made such party. (*Tr. p* 35. *f.* 62), 122

Surely, till this was done, there could have been no trial on the pleadings as they then stood.

III. THE PETITION FOR REMOVAL WAS FILED BEFORE THE TRIAL.

The "trial" meant by the Act of March 3, 1875, is evidently the judicial consideration of the case. 123

The point was considered and decided by this court in *Hess vs. Reynolds 113 U. S. 80.*

"It is said that the trial spoken of had taken place before the commissioners of Ionia County, to whom the case had been referred. But we do not look upon that proceeding as a trial within the meaning of the statute. It was merely a
124 report, subject to be *affirmed or rejected* by the probate judge, and by the express terms of the statute subject to a right of appeal to a court in which a trial by jury could be had. The latter was the final hearing or trial of the suit which would conclude the right of removal, and until such trial commenced the right of removal under the provision remained."

So the word "trial" in the South Carolina code of proceedure means "the judicial examination of the issue between the parties."

125

There had been no judicial examination of the issues when the petition for removal was filed. There had been no examination whatever of the issues.

On the 16th of December, 1879 (fol. 22) the case was referred to a master "to TAKE TESTIMONY AND REPORT THE SAME." There was no judicial duty imposed upon the master. His judgment was not asked on the matter. If it had been
126 given it would have been impertinent. The duty imposed by this order is executed in some courts, by an officer called an examiner. It is purely clerical work.

His report might have stood on file forever and yet would have resulted in nothing,—no more than the return of a commission to take testimony.

127 Judge Pressley decides that the proceedings before the master, (simply to take testimony) was the beginning of the trial. (*No.* 245, 33 *p.* 19).

The state supreme court it will doubtless be contended affirms this, in saying of his "*reasons*" for this decree: "They seem to us to be quite sufficient and to be sustained by authority. (*No.* 245 *p.* 42, *f.* 85.)

But Judge Pressley gives no "reasons" for this part of his decree. He simply decides that the petition for removal was not filed until after the trial had begun.

The supreme court notices all his other points specially, but 128
passes this over in silence.

It can hardly therefore have meant to concur with Judge Pressley on this point.

This is a case in chancery. The duties and powers of a referee in a law case, and a master in chancery, are dissimilar.

"There is no difference between the report of a referee in "an equity case now, and that of a master, commissioner or "referee, under the former practice. The report comes up "subject to exceptions and stands *for confirmation by the* "*judge.*" 129

Thorpe vs. Thorpe, 12 *S. C.*, 168, (1879).

Judge Pressley's decree is filed 25th March, 1880.
The state supreme court's decree is filed 28th October, 1882.

"It will be observed that, by the terms of the order of refer- "ence, the issues in the action were not referred to the referee "to be heard and determined by him, but he was simply re- "quired to take testimony and state all the accounts of the "parties in this action, and report the same to this court; and 130
"as section 395 of the code, subdivision 1, provides 'that the "referee may be directed to hear and decide the whole issue, "*or* report upon any specific question of fact involved therein;' "the defendant might well have supposed that the object of "the order of reference was *not* to preclude him from his con- "stitutional right of *trial* by jury, inasmuch as the order did "not authorize the referee to hear and determine the issue, but "simply to take the testimony, state the accounts and report "the same to the court, and that when the report came in, the "question as to the *mode of trial* could be made." 131

"Accordingly, when the report was made to the court, the

question as to the mode of trial was at once raised, and we think it was in time, inasmuch as up to that time *there had been no trial of any of the issues in this action.*"

Smith & Co. vs. Eryce. 17 *S. C.*, 544. (*April Term*, 1882).

"These provisions of the code," (viz: "sections on trials "by referees) however, are understood to apply especially to
182 "referees appointed under the code in actions at law, and not "to referees appointed in equity causes. These latter are "governed by a different rule: the rule which prevailed under "the old chancery practice, where causes were referred to the "master, an officer of the court, or to a referee, or sometimes "to a jury, to assist the court and *for its information.*"

Fields vs Hurst, 20 *S. C.* 296. (1883).

It was while the testimony was in course of taking, while the case was "in preparation" that the petition for removal was filed. There was no ground for the decision below that
183 the case was then on trial by anyone.

In the case of *Hess vs. Reynolds*, above cited, the commissioner to whom the case was referred had judicial functions and actually rendered a judgment in the case. The distinction between that case and the present one is in favor of the latter.

134

II. THE FORMALITIES PRESCRIBED BY THE ACT HAD BEEN FULFILLED.

The only point to be considered is in regard to the verification of the petition. The state court held it to be insufficient. (fol. 33).

Even if it was defective, the defect was clearly amendable.
135 *Ayers vs. Watson*, 114 *U. S.* 594.
Canal Co. vs. Hart, 114 *U. S.* 660.

The proceedings were complete under the act of March 3, 1875.

136

THE QUESTION OF REMOVAL IN THE CIRCUIT COURT. (NO. 462).

On the 9th of March, 1880, Mrs. Carson filed in the circuit court of the United States for the district of South Carolina a transcript of the record of the case in the state court. (fol. I.).

On the 10th of December, 1881, she moved to amend her answer by striking out the averments as to residence and domicile in New York. In support of the motion was filed 137
the affidavit of James Lowndes, her counsel, averring that the said words were inserted in the answer entirely by the mistake of him the deponent; that Mrs. Carson knew nothing about the answer when it was filed, and as soon as she knew of it called attention to the mistake. (fol. 18).

The affidavits of Robert Winthrop, Mary E. Dewey Charles C. Dewey and James Lowndes filed in support of the said motion, aver that in May or June, 1877, Mrs. Carson went to Massachusetts and resided there during the summer of 1877; that such residence was adopted with the declared pur- 138
pose of becoming a citizen of Massachusetts; that at that time she executed a formal declaration of her Massachusetts citizenship; and that she proceeded directly from Massachusetts to Europe, where she has ever since resided.

On the 10th of December, 1881, the complainant moved to remand the cause to the state court.

On the 13th of December, 1881, the motion to amend was denied and the case was remanded to the state court on the ground that the petition to remove had been filed after the trial had begun. 139

An important distinction exists between the functions of the

state court and the circuit court on the question of removal. In the former court, the duty of the court was limited to discovering whether the *allegations* of the petition satisfied the act of March 3rd, 1875, and whether the requirements of the statute had been fulfilled. In the latter court, those matters were to be considered, and in addition to them the further question whether the facts alleged of the petition were true.
140 This results from the 5th section of the act of March 3d, 1875, which is in these words:

"Sec. 5. That if any suit commenced in a circuit court or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs
141 or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just; but the order of the said circuit court dismissing or remanding said cause to the state court shall be reviewable by the supreme court on a writ of error or appeal, as the case may be.

It thus appears that the allegations of the petition were
142 traversable in the circuit court, and that the issue as to their truth was triable there. Was the judgment of the circuit court on this issue correct?

The petition alleges Mrs. Carson's citizenship in Massachusetts. The affidavit of her counsel showed that the averment of residence in New York was the mistake of counsel, that Mrs. Carson had nothing to do with the averment, and that in fact it was completely erroneous. On the other hand, there was uncontradicted evidence of the acts of Mrs. Carson, by which she sought to acquire citizenship in Massachusetts.
143 A question in the case is whether those acts sufficed for the purpose.

A person may make a change of residence for the purpose of giving the United States courts jurisdiction. It was so held when this controversy was first here :

Robertson vs. Carson, 19 Wall. 106.

It is evident that Mrs. Carson acted upon this hint in making her residence in Massachusetts in the summer of 1877.

144

"In one of the pleas it is avered that the plaintiff lived in Texas twelve years and upward, and that for the purpose of beginning this suit, he went to the state of Maryland, and was absent from Texas about four months. The change of citizenship, even for the purpose of bring a suit in the federal court, must be with the bona fide intention of becoma citizen of the state to which the party removes. Nothing short of this can give him a right to sue in the federal courts, held in the state from whence he removed. If League was not a citizen of Maryland his short absence in that state, 145
without a bona fide intention of changing his citizenship, could give him no right to prosecute this suit." (*Jones vs. League, 18 How., 76.*)

The circuit court did not pass upon the question of Mrs. Carson's citizenship.

But the right to remove did not rest alone upon the citizenship of the parties. It appeared on the record that the case was one "arising under the laws of the United States." 146
It was on that ground removable into the circuit court. The point has been fully discussed. (ante p.)

The judgment of the circuit court in remanding the case rested solely on the ground that the petition for removal had been filed too late. The point has been discussed (ante p. 29–34) and it is confidently submitted that the circuit court erred in regard to it.

147

The conclusion from this argument is that the state court erred in taking jurisdiction after the filing of the petition, that its judgment should be reversed and that it should be directed not to proceed in the case: that the circuit court erred in its judgment remanding the case: that its judgment should be reversed and the court directed to take cognizance of the case.

148

If the court should hold that the case in the circuit court was ipso facto removed by the filing of the petition but was properly remanded, then all the proceedings between the filing of the petition on Feb. 16, 1880, (No 245, fol. 24) and the order remanding the case on Dec. 13, 1881. (No. 462 fol. 13) are void. The decree of foreclosure was made in the period (No. 245 fol. 57).

149

A. G. MAGRATH,
H. E. YOUNG,
For Mrs. Carson.

APPENDICES.

A

Mortgage of Dean Hall.

To all whom these present may concern, I, Elias N. Ball, of Charleston, in the State aforesaid, send greeting: 150

Whereas I, the said Elias N. Ball, in and by five certain bonds or obligations, bearing date the , stand firmly held and bound unto Alexander Robertson and John F. Blacklock, executors of the last will and testament of William A. Carson, deceased, in the penal sum of seventy thousand dollars, viz: * * * *

Transcript, McBurney v. Carson, pp. 39 and 41.

B 151

Account of A. Robertson and J. F. Blacklock, executors.

ESTATE OF WILLIAM A. CARSON
in account with
ALEXANDER ROBERTSON and J. F. BLACKLOCK, *executors.*

1856.	*Debits.*		
Aug. 17.	To paid Robertson & Blacklock & Co., attested acc't for balance due them by testator, per their acc't book, rendered herewith	$25,106 04	152
Sept. 2.	St. Michael's Church bill, 11.00; 4. Mrs. Carson for self and family, 50	61 00	
15.	Paid F. Windham for 108 cords wood for Dean Hall mills . .	378 00	
27.	Mrs. Carson, self and family, 50; Box & Posi, bill tuition Wm. & J. P. C., 54.87	104 87	
Oct. 2.	6 mos. ass't on pew St. Michael's Church, due 1st inst	14 60	
20.	Mrs. C. Carson, for self and family	50 00	153
30.	F. Windham, for 108 cords wood for Dean Hall mills	378 00	

30.	Miss E. S. Smith, for 1 yr's int. on testator's bond for $3,500 . . .	245 00
31.	Bee & Tylee, for sundry articles, wire, &c., for mills	412 23
Nov. 3.	Road Tax, for Sullivan's Island, 6.00; Geo. Bursh, ordinary, 16 . .	22 00
19.	John May's acc't, 55.00; 26. Lockwood & Johnson, repairing mills,	
154	177,59	232 59
29.	Mrs. Carson, self and family . . .	200 00
Dec. 3.	1 mos. insurance on Dean Hall mills, 10,500, at 1½ per ct. . . .	157 50
10.	F. Windham, 126 cords lightwood for same	441 00
19.	H. Bischoff, provisions, boat hands, 17.46; Jan. 9, 1857, Lachicotte, miller, 100	117 46
155	1857.	
Jan. 14.	J. D. Murray, overseer, 100; 15. Tom. Bell for rice barrels, 51.25 .	151 25
15	R. Townsend, rice barrels, 60,00; Box & Posi, tuition of Wm. and J. P. C., 52.12.	112 12
12	Assessment for widening street on Sullivan' Island	25 00
	Dr. T. L. Ogier, medical acc't . .	356 00
20.	Robertson, B. C Co., attested acc't for bal, schr. A. L. Conkling's acc't	5,273 78
156		
30	S. N. & J. W. Hart's attes. acc't, 68,75; Feb. 2. P. Lachicotte in full as miller, 100	168 75
Feb. 4.	Plenty & Benbon, rice barrels, 20.00; B. H. Read, for bbls and staves, 230.83	250 83
11.	Testator's note, in Bk. State S. C., dated 3 June, with int	409 00
	Testator's note in Bk. State S. C.,	
157	dated 28 May, with int.	2,050 50
	Testator's note, in Bk. State, S. C., dated 9 June, with int.	2,050 50

16	Mr. & Mrs. R. Roper, in full p:in. & int. testator's bond to her . . .	3,359 30	
	John D. Murray, in full of wages as overseer, and all demands . . .	900 00	
18.	De Saussure & Son, att'ys Eliza Rutledge, in full, prin. & int, test bond	1,911 98	
	De Saussure & Son, att'ys Eliza Rutledge in full, prin. & int. test. bond	3,409 48	158
Feb. 18.	Paid H. A. De Saussure, ex'or M. S. Boone, ex'ix, in full, prin. & int. test. bond	2,237 45	
	Paid H. A. De Saussure, ex'or M. S. Boone, ex'ix, in full, prin. and int., test bond	459 44	
	Paid H. A. De Saussure, in full, prin. & int., test. bond to him	2,160 64	159
	Paid Wm. Birnie, ex'or John Black, in full, prin, &. int., test. bond .	15,985 83	
19	Paid J. K. Robinson in full. prin. & int, test. bond to J. W. Gray, master in equity	4,218 78	
20.	Paid Colis Kelton's bill, 10.75 ; 21. Mrs. M. H. Pyatt in full prin. and int. of test. bond bond assg. her .	10,362 46	
21.	Paid Miss Mary Cripps in full, prin. & int., of testator's bond assigned her	3,145 27	160
13.	Paid Stebbins & Miller in full "test. note" & protest	350 00	
23.	Paid Miss E. S. Smith "bond" & protest	3,596 64	
25,	Paid H. Gourdin, ex'or Dr. Elias Ball, bond & protest	3,702 20	
Mar. 4.	Paid Mount Pleasant Ferry Co's attest acc't $19.47 & 26.89 . . .	46 36	
	Paid testator's subscription to Farmer & Planter	4 20	161

	11,	Pecere C. Kane & Edith Kane in full of her legacy under the will of the late Mrs. Elizabeth Carson.	2,000 00
	12	Paid Ravenel & Co. in full test. bond due 1 Jan., 1856. $1,912.50, & int. to date 159.54	2,072 04
162		Paid T. W. Easterlin, gen. tax, 1856; direct tax, 1857, for St. Johns Berkley	215 96
	17.	Paid J. Gadsden for rice barrels . .	58 63
	26.	Paid Lockwood & J. attested acc'ts, $783.83, 74.74 & 13.83	822 40
	28.	Wm. Calder attest acc't, 492.19; C. H. West & Sons attest, 809,92, 187.63, 997,55	1,489 74
	30	Paid Klinck & Wickenberg, 233.58; Klinck & W. for family, 98.05 . .	331 63
163		Paid Mills, Beach & Co., acc't family, 34.84; Mills, B. & C., attest acc't, 75,98	110 82
		Paid C. Rame, attest acc't, 26.82; A. Della Torre, attest acc't, 42.28 . .	69 10
	31.	Paid P. V. Dibble, attest acc't, 18.50; E. M. Carey's attest acc't, 50.06 .	68 58
	Ap'il 1	Paid three mos' assesm't, pew in St. Michael's Church to 1st Jan'y .	7 00
164	7	Paid Edgerton and Richards attest acc't, 119.20; 8 R. A. Pringle attest acc't, 80.03	119 23
		Paid R. A. Pringle acc't for family, 27.75; 14. P. R. Lachicotte, attest, acc't, 423.50, 350	801 18
	15	Paid Cameron & Mustard attest acc't	551 22
		E. Bull's acc't for machinery & wharfage on same	68.29
	17.	Reynolds & Co., attest acc't, 177.25; M. H. Nathan's, attest acc't, 83.50	260 75
165	18	Paid Love & Strenge's attest acc't, 47.61; Dr. Peter Porcher's attest acc't, 25.00	72 61

	Paid George W. Olney, acc't, 3.42; 22. Courier Office, attest acc't, 19.06 .	22	48	
	Paid Courier Office acc't, 18.20; 28. Otis Phillip's attest acct, 85.25 .	103	45	
May 6.	Paid gen. tax 1856, dist tax 1857, for Christ Church	3	57	
	Paid Hayden & Wilden, attest acc't, 28.00; Capt. S. F. Dexter's attest 2.63	30	63	166
9.	Paid John Thompson & Co., attest acc't, 4.44; Petigru & King, prof. serv., 215.00	219	44	
	Paid P. C. Richardson & Bro., attest acc't, 3.25; 13. Mathisen & O'Hara, attest acc't, 94.37 . . .	98	12	
14.	Paid Dr. W. S. Moultrie for 14 bbls, 28.88; 19 B. C. Lock, attest acc't, 10.33	39	21	167
27	Paid Charleston Standard, acc't, 17.40; June 1, Dawse and Blackman, attest acc't, 369	21	09	
June 1.	Paid John Gravely & Co., acc't, 5.66; 8. Dr. Edmund Ravenel, attest acc't, 93.00	98	56	
4.	Paid Mrs. C. Carson in full of legacy bequeathed by test	2,000	00	
9.	Paid Thom. O'Brian, attest acc't, 11.75; 10. L. Chapin's attest acc't, 40.00	51	75	168
11.	Paid B. A. Rodrigues, attest acc't, 2.00; 12. Charleston Marine Society, 12.76	14	75	
22.	Paid Robertson, B. & Co., acc't for plantation and mill supplies . .	1,869	34	
	Paid the trustees of Mrs. Caroline Carson, ⅓ of the residue of the purchase money of the——— by order of the will, as per distribution as made this day between herself and her two sons, say—			169

	Paid the trustees of William Carson, on third do., say—		
	In Elias N. Ball's bond for	11,000 00	
	" " " " "	9,000 00	
	" " " ⅓ of 4,000 .	1,333 33	
	And in cash	166 67	
			21,500 00
170	To paid the trustees William Carson on third do., say—		
	In Elias N. Ball's bond for	11,000 00	
	" " " " "	9,000 00	
	" " " ⅓ of 4,000	1,333 33	
	And in cash	166 67	
			21,500 00
	To paid the trustees of James P. Carson, on third of residue, aforesaid, say—		
171	In Elias N. Ball's bond for	11,000 00	
	" " " "	9,000 00	
	" " " ⅓ of 4,000	1,333 33	
	And in cash	166 67	
			21,500 00
	To 2½ per ct. comm's on rec'g $154,261.79, $4,606.55. 2½ per ct. on paying $172,899 65, 4,322.49 .		$8,929 04
	Balance due estate		2,433 10
172	Total		$184,261 79

Transcript McBurney vs. Carson, pp. 43-47.

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APR 21 1886
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APR 12 1886
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CLERK.

118-279

IN THE

Supreme Court of the United States.

October Term, 1885.

CAROLINE CARSON
vs.
MARY A. HYATT *et al.* } No. 245.

Supplemental Brief for Appellant.

The argument for the appellant rested entirely on the facts set forth in the transcript. A supplemental brief has been filed, in which it is asserted that a judgment in default could have been taken against Mrs. Carson. The date at which it is supposed by the appellee that such a judgment could have been taken is not suggested.

It is alleged (appellees' brief, p. 7) that the complaint was filed on the 15th October, A. D. 1879. If the appellant was summoned by publication, she could not, under the South Carolina Code of Procedure, be deemed summoned in less than six weeks. (Sec. 158, Code of South Carolina.) That is, she was summoned in law on the 27th November, 1879. (Sec. 160, Code of South Carolina). The answer was to be filed in twenty days thereafter (sec. 166); so that there would have been no default in answering until the 17th December, 1879. The appellant appeared on December 16, 1879, and was given time to answer (fol. 22, Trans.); so that there was no moment of time at which a judgment by default could have been taken.

It is not pretended that any judgment by default was in fact taken. The case proceeded regularly by the appearance of the claimant.

But if there had been a judgment by default, the result would not have been otherwise. The act of 1875 does not deprive a party of the right of removal who is not actually in court to seek the removal. Until the party is in court he is a stranger to the proceedings; he is only to act promptly after coming into court.

This precise point was before the court in Harter *v.* Kernochan, (103 U. S., 596.) There a judgment by default had actually been rendered. Several terms thereafter the party came in, obtained an order setting aside the judgment, and was allowed to remove.

The appellant could have moved at *any* time *before* judgment, and at any time within *seven* years *after* judgment, for leave to defend. (Code, sec. 158.)

The alterations made in sections 294–295 of the Code by the act of 1878 do not affect this controversy.

CLARENCE A. SEWARD,
JAMES LOWNDES,
of Counsel for Mrs. Carson.

118-279

Office Supreme Court U. S.
FILED.
APR 15 1886
JAMES H. McKENNEY.
CLERK.

SUPREME COURT OF THE U. S.

OCTOBER TERM, 1885.

No. 245.

CAROLINE CARSON

vs.

MARY A. HYATT ET. AL.

STATEMENT AND ARGUMENT FOR APPELLEES.

The late William A. Carson, of South Carolina, possessed of a valuable estate, real and personal, consisting principally of a plantation known as "Dean Hall," and a number of negroes thereon, by his last will and testament, after making several bequests of personal property, directed his executors, or such one as might qualify, to sell all his estate, real and personal, as soon after his decease as they or he might deem judicious, and to hold the proceeds subject to certain trusts. 1

He died 17th August, 1856. His will bears date 11th March, 1854, and was proved before the proper officer of record, 18 August, 1856, when Alexander Robertson and John F. Blacklock, named as executors, qualified. 2

By the terms of the will the proceeds of the sale of testator's estate, after the payment of debts, was to be divided into three parts and to be held by the executors in trust to pay the interest arising from one-third to his widow, the appellant, and the other two-thirds for the maintenance and educations of his two sons during their minorities, and to them on their attaining the age of twenty-one respectively. Her two 3

sons assigned their interests to the appellant, and she is alone interested.

The executors proceeded soon after the death of the testator, pursuant to the directions of the will, to sell the plantation "Dean Hall," and thereupon, on the 2nd February, 1857,
4 duly conveyed it to one Elias N. Ball for the sum of $50,000, of which $15,000 was paid in cash, and the balance by his bonds secured by a mortgage to them *as executors.*

The purchaser, E. N. Ball, entered into possession of Dean Hall and held it until the month of March, 1863, when he contracted with Hyatt, McBurney & Co., of Charleston, S. C., to sell the plantation to them for $100,000.

This contract "was approved and confirmed by the advice
5 of the late honorable James L. Petigru, the father of Mrs. Carson, who had also been her legal adviser and director." (*See answer of Robertson, signed by H. E. Young, Record McBurney v. Carson, Sup. Ct. U. S., p. 24.*) Mr. Petigru "expressed great anxiety to have the matter wound up," urging a compliance for the purpose of securing something "from Ball, who paid nobody," as he said, and to provide the means of support for one of the legatees, James P. Carson, then still a minor residing with him in South Carolina, (*Testimony Ibid, p* 33).

6

Pursuant to this contract, Hyatt, McBurney & Co., as soon as the title had been examined and approved by their solicitor, paid on account of the purchase money more than $80,000, with which Ball paid off his bonds to the executors; and Alexander Robertson, one of the executors, acting under the advice of Mr. Petigru, satisfied the mortgage, and on the 7th May, 1863, Ball conveyed Dean Hall to William McBurney and Alfred L. Gillespie, two of the partners of the said Hyatt, McBurney & Co. to such uses as they or the survivor of them
7. should appoint, and until such appointment to the use of Edmund Hyatt, William Hasseltine, Thomas R. McGahn,

and the said William McBurney and Alfred Gillespie, partners of Hyatt, McBurney & Co., according to their respective interests in the partnership.

Edmund Hyatt some time after released his interest in Dean Hall, by deed bearing date 8th May, 1863, and on the 15th of the same month, Hyatt retiring from the partnership, 8
McBurney and Gillespie appointed "Dean Hall" to his use to secure a bond of the remaining partners to him for $40,000, given for the purchase of his interest in the partnership—which mortgage was duly recorded.

Caroline Carson on the 11th August, 1866, *describing herself as a citizen of New York*, filed a bill in her own right and as assignee of the rights of her two sons, in the circuit court of the United States at Charleston, for which bill she substituted another on the 14th December, 1866. The pur- 9
pose of these bills (original and substituted) was to *re-establish and set up* the mortgage given by Ball to the executors of W. A. Carson, which had been cancelled and satisfied.

To these bills, original and substituted, neither Ball, the mortgagor and vendor, nor Gillespie, one of the vendees, nor Hyatt, the appointee by way of mortgage under the deed from Ball to Hyatt and Gillespie, were made parties, nor were the other partners *cestuis que trustent* under the same; and McBurney thereupon demurred to the bills for want of proper and 10
necessary parties.

The late Chief Justice Chase on the Circuit overruled McBurney's demurrer, and the case first came before this Court on an appeal from his decision.

On this appeal, which was heard on the 27th January, 1874, Mr. Justice Swayne, delivering the opinion of the Court (See *Robertson v. Carson, 19 Wallace, p. 106*), after stating that Gillespie was an indispensable party, goes on to say:

"It appears that Hyatt has released his interest to his copartners, 11
but it also appears that they have given him a mortgage upon the

premises to secure the payment of $40,000. *If he shall not be made a party and the complainants shall be successful, his rights will not be affected by the decree. In such case he can file a new and independent bill and renew the litigation as to all the questions touching the prior mortgage which are involved in this controversy.*"

On the argument before this Court it had been pressed
12 by the counsel for Mrs. Carson that where a joinder of a party will oust the court of its jurisdiction, the Federal courts would go far in dispensing with parties, and it was urged in the argument, signed by Mr. Cushing and presented by Mr. Lowndes, that

"It is on this principle that the Chief Justice rested his decree over ruling the demurrer for want of parties in this case. *Hyatt and Gillespie being both citizens of New York, where the appellee has her domicil,* to order them to be made parties is to send the appellee out of the Federal Courts. To send her out of those courts is in consequence of the
13 decisions of the State Courts of South Carolina on this class of questions to take away from her all redress."

In response to this appeal, Mr. Justice Swayne, delivering the opinion of this court, went—if we may be permitted to say so—out of the way to suggest how Mrs. Carson might avoid this difficulty. He said:

"It is competent for a party to make a change of domicil for the purpose of giving jurisdiction to the Federal Courts where it could not otherwise exist. With that privilege and the help of this section (13 Sec. Act. 1872) there can hardly in any case be an irremediable difficulty as
14 to jurisdiction, however diversified the residence of those necessary to be made parties."

The decision of Chief Justice Chase was reversed and the cause remanded, with directions to have Ball and Gillespie made parties, and leaving Mrs. Carson to follow the advice of the court by changing her domicil, so as to make Hyatt a party also, "*or to proceed without him and take the hazard of the consequences.*"

Mrs. Carson did not follow the suggestion of the court
15 as to her change of residence, but on the 13th of June, 1874, filed an amended bill, in which *she again described herself as*

a citizen of New York and by which she attempted to bring in the assignee of Ball, who, she alleged, had, since the commencement of her proceeding, become bankrupt and died.

Upon demurrer to this amended bill the circuit court sustained the demurrer, holding that the complainant could not by way of amendment introduce matters which had taken 16
place since the filing of the original bill, to-wit: Ball's bankruptcy and death, and requiring the assignee of Ball to be made a party by supplemental bill.

The question of Mrs. Carson's domicil was agitated in these amended proceedings, some of the newly-made defendants in their answer to the amended bill raising the question that by residence in Europe she had lost her domicil in New York, and that her domicil of origin in South Carolina had thereupon reverted. This Mrs. Carson denied and *insisted* 17
that she was a citizen of New York, and so the courts held.

These orders on the amended bill were made on the 3d February, 1876. No further steps were taken until the 10th October following, when Mrs. Carson filed a supplemental bill, making E. N. Miller, the assignee of Ball, a party, and in this supplemental bill *she again described herself as a citizen of New York.*

To this supplemental bill Mrs. Carson made no other par- 18
ties than Miller, the assignee of Ball, and at the April term, 1877, the defendants, McBurney and McGahn, moved to dismiss this amended bill for want of prosecution, as they were no parties to the supplemental bill, and had not been served with subpœnas to the same (*See Record, McBurney v. Carson, p. 100*). The motion was argued on the 2d June, 1879, at length before Mr. Chief Justice Waite, at Charleston, who refused the motion.

By an oversight of this court, although this proposed order, 19
the motion for it, and its refusal, were spread upon the record

on that appeal, the courts overruled the ground of appeal because "*It does not appear to have been taken below.* (*McBurney v. Carson, 99 U. S. p. 570.*)

The cause was not again heard on its merits until the April term of 1878, when, on the 10th May, 1878, a decree of foreclosure was entered in Mrs. Carson's favor.

An appeal from the decree was taken to this court, and the cause submitted on printed arguments.

Mr. Justice Swayne again delivered the opinion of this court, and in giving the previous history of the case he says: (*McBurney vs. Carson, 99 U. S. 568–569.*)

The bill (that of Dec. 1866) did not make any member of the firm of Hyatt, Burney & Co. a party except McBurney. Hyatt it appeared was a resident of New York of which State the complainant was also a resident and citizen. Elias N. Ball was made a party, but was not served with process. The circuit court decreed in favor of the complainant. *This court held that Hyatt was not an indispensable party as the decree would not affect his rights,* but that Ball and Gillespsie were such parties. The decree was therefore reversed and the cause remanded for further proceedings.

* * * * * * *We hold as we held before that Hyatt is not an indispensable party, &c. Ibid, 569.*

Having settled the question of parties, His Honor thus states the case the court was about to decide—*Ibid, 570*—

* * * * The bill charges fraud, conspiracy and spoliation. *If the charge is untrue the bill should be dismissed.* If otherwise there is a recoil upon the wrong doers, and those intended to be dispoiled are unaffected. Their rights are just what they would have been if the scheme had been neither conceived nor executed."

And again, *Ibid, p. 571,*

* * * * *There was evidently a plot. McBurney & Co. were its contrivers, Ball was their instrument, Robertson was the dupe, and the Carsons were the victims.*

Whatever disclaimers the counsel for Mrs. Carson may have made as to the charge of actual fraud on the part of McBurney, it is clear therefore that this court treated the case

as one of actual and intentional fraud, with which, however, they did not connect Hyatt, but expressly declared that their decree would not affect his rights.

During these proceedings Mr. Hyatt died, and upon the final decision of the cause in the United States courts no other course was open to his executors, who were themselves citizens of New York, but to take proceedings in the State Court of South Carolina, which course had been anticipated by all parties. The same reason, which had all the while prevented Mrs. Carson making Hyatt a party to her proceedings in the United States Court, precluded the executors of Hyatt going into that court, to-wit: the citizenship of the parties. 24

On the 15th October, 1879, the executors of Hyatt filed a complaint in the Court of Common Pleas for Charleston County, State of South Carolina, for the foreclosure of the mortgage of McBurney and Gillespie to Hyatt, to which proceedings Mrs. Carson was made a party under the decree she had obtained. 25

The time for answering this complaint having expired on the 27th of November, and no answer of Mrs. Carson having been filed, at the next (the November) term of the court the following order was made, Mrs. Carson's attorney consenting thereto—*Transcript-Record, p. 11. f. 22*— 26

"The time for the defendants in this case to answer having expired, on motion of McCrady & Son, plaintiffs' attorneys, it is ordered that the case be referred to W. D. Clancy, Esq., one of the masters of this court, to take testimony and report the same; and with the consent of the plaintiffs' attorneys, it is further ordered that the defendant, Caroline Carson, do have further time to answer the complaint herein, to wit, until the twenty-fourth day of January next, and that she be allowed to file the same under the signature of her counsel, who has entered an appearance in the cause, without oath thereto.

A. P. ALDRICH.

December 16, 1879.

We consent. McCRADY & SON.

A. G. MAGRATH." 27

At the same term of the Court judgment by default was duly entered on 6th December, 1879, against William McBurney and Thomas R. McGahn. (*Trans. Record, p. 35, f. 62.*)

On the 31st January, 1880, the answer of Mrs. Carson was filed, signed by James Lowndes and A. G. Magrath, as her
28 attorneys, without oath. (*Trans. Record, p. 35, f. 62.*)

On the 3d February, a Reference was held before Master Clancy, at which the case was opened. "Mr. McCrady read the complaint: Hon. A. G. Magrath the answer for Mrs. Carson." (*Transcript Record, p. 15, f. 28.*)

On the 6th February another Reference was held before the Master, at which the documentary evidence was gone into on the part of the plaintiff, admissions made as to the defendant's evidence, and a witness on the part of the plain-
29 tiff examined. (*Trans. Record, pp. 15 and 16.*)

On the 10th February a third reference was held, and another witness on the part of plaintiffs examined, when the plaintiffs announced that they closed the case. (*Trans. Record p. 16.*)

On the 16th February, six days after the plaintiffs had closed their case before the Master, another referen-e was held, at which the "Hon. A. G. Magrath representing the defendant, Caroline Carson, stated that he had this day filed
30 a petition in the Clerk's office of Court of Common Pleas for Charleston County praying among other things the removal of the cause into the United States Court, and that he would not continue the reference before the Master." (*Trans. Record p. 16, f. 30.*)

Upon this the Master made the following report—(*See Trans. Record p. 14 f. 27 and p. 15.*)—

"To the Honorable B. C. Pressley, Judge of the First Circuit:

This case was referred to me by an order of this honorable court,
31 bearing date the 16th day of December 1879, to take testimony and report the same. I beg leave to respectfully report that I

have been attended by the Solicitors of the plaintiffs, Messrs. McCrady & Son, and by the Hon. A. G. Magrath, representing the answering defendant, Caroline Carson.

The complaint and answer were duly read and the plaintiff proceeded to prove her bond and mortgage, all of which will more fully appear by the testimony, a copy of which is filed herewith.

At the close of the plaintiff's case, the Hon. A. G. Magrath, counsel for Mrs. Caroline Carson, notified the Master that he had, on that day, to wit: the 16th day of February, 1880, filed a petition in the Clerk's office of 32
the Court of Common Pleas for Charleston County, in behalf of Caroline Carson, the defendant, praying in her behalf the removal of this case into the United States Court, and that it was his purpose not to proceed with this cause before the Master. Mr. McCrady, Jr., then moved that the Master file the report of the testimony taken in the cause as directed by the order of reference.

I beg leave to file also with this report and testimony a transcript of record in the case of Wm. McBurney, et al. vs. Caroline Carson, in the Supreme Court of the United States, introduced in evidence by the plaintiffs, all of which is respectfully submitted.

W. D. CLANCY, Master."

Charleston, S. C., 25 February, 1880. 33

The petition filed in the Court of Common Pleas, as stated by Judge Magrath, was not signed by Mrs. Carson herself nor by Judge Magrath, but by Mr. James Lowndes only. The petition which was in the usual form of a petition for removal, alleged that Mrs. Carson was a citizen of Massachusetts. (*Trans. Record p. 12 and 13.*)

With the petition was filed an affidavit of Mr. Lowndes, that the facts therein stated were true to the best of his information and belief, and that he could not aver that Dean Hall was 34
of a greater value than $5,000, and stating (*Trans. Record p. 13, f. 25*)

* * * that his information as to the domicile of Caroline Carson *is drawn from these facts,* viz: That about the 1st of July, 1877, he received in due course of mail, a letter from the said Caroline Carson dated at Brookline, Massachusetts, in which she informed deponent that she had made a declaration or affidavit of her change of domicile from New York to Massachusetts, and that deponent continued to receive letters from her *in the latter State* during the month of July, 1877, and he knows her purpose to have been to become a citizen of Massachusetts; and he knows she has not in fact for many years resided in 35
New York.

On the 10th of March, 1880, Mrs. Carson's attorney moved before Honorable B. C. Pressley, in the Court of Common Pleas, to remove the cause in accordance with this petition, whereupon, after argument by counsel, His Honor, on the 25th March, filed the following order refusing the motion (*Trans. Record, p. 19, f. 33.*)—

36 "The plaintiffs in this case except one, a Spanish subject, are citizens of the State of New York, and the controversy, as appears by the pleadings, is wholly between them and the defendant, Caroline Carson, *who in her answer states that she is also a citizen of that State.* She has also filed with her answer an exhibit of a previous case in the United States Court relating to the same matter, in which case she was plaintiff *suing as a citizen of the State of New York.* No motion has been made by her for leave to amend or withdraw her answer, nor has any affidavit or other testimony been submitted, showing that her answer was erroneous and the matter therein in reference to her citizenship was inserted by inadvertence or mistake. After the case had been referred to the Master, and after the filing of her said answer by the said defend-
37 ant, and the Master attended by the attorneys for the plaintiffs and said defendant had finished taking the testimony offered by the plaintiffs, the said defendant filed a petition in this Court praying a removal of this case to the Circuit Court of the United States, and alleging that she is a citizen of the State of Massachusetts.

That petition is not properly verified, and the insufficent affidavit by her attorney does not state any matter which would justify me in disregarding the positive statement in her answer and exhibit.

I therefore hold that the controversy in this case is between *a citizen of the State of New York* on the one side, and other citizens of the same State and a Spanish subject on the other side; *and further that the petition of defendant for the removal of the case was not filed until after the trial had commenced.*

38 She is therefore not entitled to have the case removed from this Court, and her motion to that effect is refused."

The cause was therefore heard on its merits by Judge Pressley, who reserved his decision, which was afterwards filed the 30th August following (1880). Judge Pressley decided as follows (*Trans. Record, p. 20, f. 36.*):

"In this case the plaintiffs seek to foreclose their mortgage on Dean Hall plantation, which secures a debt due them by McBurney & Co. Their co-defendant, Mrs. Carson, held an older mortgage on said plantation which one of the executors to whom the mortgage was given satis-
39 fied during the war. That satisfaction was set aside as fraudulent and void by the Supreme Court of the United States in a case to which

McBurney & Co. were parties, but plaintiffs were not parties to that case. *I find here not a shadow of fraud either in the circumstances attending the said satisfaction or in the nature of the payment, and the very high character of all parties to that transaction would rebut even strong proof of fraud if such had been produced in the case.* In the absence of all proof in that respect, I follow the decision of the Supreme Court of this State, and hold the plaintiffs have a valid mortgage on said plantation discharged of the said older mortgage."

40

But his Honor, in deference to the Courts of the United States, ordered the cause recommitted to the Master, to take testimony and report whether the plaintiffs could, without difficult or expensive litigation, procure payment from the obligors of the bond otherwise than by the foreclosure of their mortgage.

From this decree both parties appealed to the Supreme Court of the State. (*Trans. Record, p. 21, f. 38 and p. 22, f. 39.*)

These appeals were heard by the Supreme Court of the 41
State of South Carolina at the April Term, 1881, and so much of the decree of Judge Pressley as recommitted the cause to the Master was reversed, the Court holding that the executors of Hyatt were entitled to have the mortgage foreclosed according to the usual mode in such case, and the cause was remanded for such further proceedings as might be necessary to enforce the principles of the opinion. (*Trans. Record, p. 22, f. 40.*)

The cause was remitted to the Court below, July 18, 1881, 42
and a decree of foreclosure was made by his honor Judge J. B. Kershaw on the 9th September, 1881. (*Trans. Record, p. 31, f. 54.*)

From this decree another appeal was taken by the counsel for Mrs. Carson.

In the meanwhile on the 9th March, 1880, a transcript of record in the cause had been filed in the Circuit Court of the 43
United States, and at the November Term, 1881, the solicitor

of Mrs. Carson, on the 10th December, 1881, moved the following order (*Trans. Record, Appeal from Circuit Court U. S., No. 462, p. 3, f. 7.*):

"On motion of James Lowndes (with A. G. Magrath and H. E. Young), solicitors for Caroline Carson, one of the defendants, it is ordered that she have leave to amend her answer in this cause by
44 striking out the following words from the fourth paragraph of the said answer, that is to say, 'where she has ever since resided and had her 'domicile,' and substituting for them the following words, that is to say, 'where she resided and had her domicile till some time in the summer of 1877 (May or June), when she removed her domicile and residence to the State of Massachusetts, and became a citizen thereof and has ever since remained such, though her actual temporary domicile has been during such period and now is in Europe, most chiefly in Rome, Italy."

And at the same time the plaintiffs, the executors of Hyatt, moved to remand the cause to the State Court, where-
45 upon, after arguments, his Honor Judge Hugh L. Bond, Circuit Judge, made the following order: (*Tran. Record* [*No. 462.*] *p. 5, f. 13.*)

"It is ordered, adjudged and decreed, that the petition of Caroline Carson not having been filed in the said Court until after answer had been filed in the said Court, and the Master, under order of reference, had proceeded to take testimony in the cause, *the filing of said petition was too late, the trial of said cause in the judgment of this court having been begun.*

It is further ordered and decreed that the said cause is hereby remanded to the Court from which it was sought to be removed.

It is further ordered and adjudged that the motion to amend Mrs.
46 Carson's answer be overruled."

Mrs. Carson's appeal to the Supreme Court of the State of South Carolina from Judge Kershaw's decree of foreclosure, came on to be heard at the April Term, 1882, and thereupon, after a most exhaustive argument, the Court, in an elaborate and carefully considered opinion, reviewing the whole case and all the former decisions of the State Court relating to its subject, confirmed the decree of Judge Kershaw
47 in favor of the executors of Hyatt. (See *Hyatt vs. McBurney, 18 So. Ca., p. 199, Trans Record, p. 36, f. 63.*)

An appeal was taken from the decision of the Circuit Court of the United States—and upon the decision of the Supreme Court of the State of South Carolina a writ of error was obtained from this Court—and the cause is brought here, as we understand, upon two grounds of Federal jurisdiction:

1st. That both the State Court and the Circuit Court of the United States erred in their refusal to remove the cause from 48
the State Court.

2d. That the State Court refused to give validity and effect to the judgment of the Courts of the United States.

ARGUMENT.

I.

1. *Did both the State Court and the Circuit Court of the United States err in their refusal to remove the cause from the State Court?*

In considering this question we submit the following prop- 49
ositions:

1. That the State Court was not bound to surrender the jurisdiction unless, (a) the petition was filed in the proper time; and (b) upon its face its statements, taken in connection with the other parts of the record, showed the right of the petitioner to the transfer.

2. That in this case the petition was not filed in the proper time.

3. That the allegations of the petition when filed were not sufficient in themselves. 50

4. That the allegations of the petition taken in connection with the other parts of the record were contradictory thereto.

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1. *That the State Court was not bound to surrender its jurisdiction unless the petition was filed in the proper time, and upon its face its statements, taken in connection with the other parts of the record, showed the right of the petitioner to the transfer.*

The position of the appellant is that the State Court had no jurisdiction to question the right of removal, but was bound 51
upon the filing of a petition claiming the right at once

to accede to it without examination. That upon the filing of the petition for the removal from the State to the United States Court by Mrs. Carson, on the 9th March, 1880, all rightful jurisdiction of the State Court *ipso facto* ceased, and all further proceedings in that Court therein were void.

The authorities and decisions do not sustain this position.
52 Judge Dillon, whose work on the Removal of Causes leans always to the exercise of the right, does not go to this extent. On the contrary this is what he says (*Removal of Causes 2d Ed.* § *69, 3d Ed. Sec. 76.*)—

"If the petition in connection with the pleadings does not show that the case is removable, the jurisdiction of the State Court is not ousted, and the subsequent proceedings, if it refused to order the removal, would not it is supposed be void or erroneous.

The authority which he cites, and the decisions of this Court since the publication of his work, are clear that before
53 a State Court can be required to give up its jurisdiction, it must be made to appear to it that the party petitioning has a right to the removal. "The petition in connection with the pleadings" must show that the party has the right.

In the very first case upon the subject of removal, a case arising under the Judiciary Act of 1789, *Gordon v. Longest, 10 Peters, 97*, McLean, J., delivering the opinion of the Court, says: "*It must be made to appear to the* satisfaction of the State Courts that the defendant is an alien or a citizen of some other State than that in which the suit is brought."
54 So in *Kanouse vs. Martin, 15 How., 207*, the jurisdiction of the U. S. Court was maintained on the ground that the jurisdictional amount and citizenship *was made to appear* to the *State* Court.

The recent decisions of this Court have been more explicit. In the case of *Railway Co. vs. Ramsay, 22 Wallace, 328*, Chief Justice Waite thus tersely states the requisites of the petition for removal:

"To obtain a transfer of a suit, the party claiming it must file in the State Court a petition therefor, and tender the requisite security.
55 *Such a petitioner must state facts sufficient to entitle him to have the transfer made.* This cannot be done without showing that the Circuit Court

would have jurisdiction of the suit when transferred. The one necessarily includes the other. *If, upon the hearing of the petition, it is sustained by proof*, the State Court can proceed no further.

In the case of the *Insurance Co. v. Pechner, 95 U. S., p. 185*, the Chief Justice thus again states the law upon the subject:

"The right of removal is statutory. Before a party can avail himself of it he must show upon the record that his is a case which comes 56
within the provisions of the Statute. His petition for removal when filed becomes a part of the record in the cause. It should state facts, which, taken in connection with such as already appear, entitle him to the transfer. If he fails in this, he has not in law shown to the Court that it cannot 'proceed further with the cause.' *Having once acquired jurisdiction, the Court may proceed until it is judicially informed that its power over the cause has been suspended.* * * * The Court had the right to take the case as made by the party himself, and not inquire further. *If that was not sufficient to oust the jurisdiction, there was no reason why the Court might not proceed with the cause.*"

In the case of *Amory vs. Amory*, reported together with the case just cited (*95 U. S., 187*), the Chief Justice adds: 57

"Holding, as we do, that a State Court is not bound to surrender its jurisdiction upon a petition for a removal until at least a petition is filed, which upon its face shows the right of the petitioner to the transfer, it was not error for the Court to retain these causes.

The two last cases arose under the Act 1867. In the next case, that of the *Gold Washing and Water Co. vs. Keyes, 96 U. S. 199*, which was under the Act of 1875, the Chief Justice again states the rule. He says at *p. 202:*

"For the purpose of the transfer of a cause the petition for removal 58
which the Statute requires performs the offices of pleading. Upon its statement in connection with other parts of the record, the Court must act in declaring the law upon the question it presents. It should therefore set forth the essential facts not otherwise appearing in the case which the law has made conditions precedent to the change of jurisdiction. If it fails in this, it is defective in substance and must be treated accordingly. Thus in *Insurance Co. vs. Pechner* (95 *U. S., p.* 183) we decided that a petition for removal on account of the citizenship of the parties *did not divest the State Court of its power to proceed, because, when taken in connection with the pleadings and process in the cause, it failed to show such citizenship at the time of the commencement of the action as would give the circuit court jurisdiction. And in Amory vs. Amory Id., 186, we held to the same effect in reference to a petition, which failed to set forth the* 59
personal citizenship of the parties."

In *Robertson v. Cease, 97 U. S., 649*, Mr. Justice Harlan, delivering the opinion of the Court in a removal cause, adds:

"In cases where jurisdiction depends upon the citizenship of the parties, such citizenship or the facts which in legal intendment constitute it should be *distinctly and positively averred in the pleadings, or they should appear affirmatively and with equal distinctness* in other parts of the
60 record.

In *Yulee v. Vose, 99 U. S. 539*, the Chief Justice remarks:

"The petition and the affidavit which accompany it are to be taken together as a part of the same instrument. They are also to be considered in connection with the other parts of the record to which they belong."

In the *Removal Causes, 100 U. S. 457 (at p. 474)*, the Chief Justice again repeats:

61 "We fully recognize the principle heretofore asserted in many cases *that the State court is not required to let go its jurisdiction until a case is made which upon its face shows that the petitioner can remove the cause as a matter of right.*"

This Court in *Kern vs. Huidekoper, 103 U. S. 485*, and *Railroad Co. vs. Koontz, 104 U. S. 5*, it is true, again announced the well known rule that when the State Court has once lost its jurisdiction it is prohibited from proceeding until in some way jurisdiction has been restored, but in those cases the Chief Justice was careful in delivering the opinion to limit the application to cases in which the State Court
62 "*wrongfully refused to give up its jurisdiction.*" And so in the case of *Gregory vs. Hartley, 113 U. S. 742*, in which the State Court had refused to give up its jurisdiction, the Chief Justice again declares, at p. 745:

"To our minds it is very clear that there was no error in the rulings of the Courts below upon the Federal question involved, which alone can be considered by us. *The District Court was not bound to surrender its jurisdiction until a case was made which on the face of the record showed that the petitioners were in law entitled to removal.* The mere filing of a petition is not enough, unless, taken in connection with the rest of the record, it
63 shows on its face that the petitioner has, under the statute, the right to take the suit to another tribunal."

Petition not Filed in Time.

The Supreme Court of the State, relying upon the authority of the Court in the *Removal Causes*, held that Judge Pressley had not erred in refusing to give up his jurisdiction until a case was made which upon its face showed that the petitioner was entitled to remove the cause as a matter of right. Surely in this there was no error.

64

2. *That this petition was not filed in the proper time.*

The Circuit Judge of the State, his Honor Judge Pressley, the Supreme Court of the State, and the Circuit Judge of the United States, his Honor Judge Bond, have all agreed that the petition in this case was not filed in time. Were they all in error?

The Act of 1875 requires the petition in the State Court to be filed therein (a) "before or at the term at which such cause could be first tried; (b) and before the trial thereof."

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(a) In the case of *Babbit v. Clark 103 U. S. p. 606* a cause which, by the practice of the State Court of Ohio, stood for trial upon the issue raised by petition and answer (the rule having expired without the plaintiff filing a reply, the plaintiff however having afterwards filed a reply but without leave and notice), and the cause having been continued until the ensuing term, when, before the cause was called for trial, the defendant presented the petition for removal, the Chief Justice in delivering the opinion of the Court, says:

66

The Act of 1875 requires that the petition for removal shall be filed in the State Court *at or before the term at which the suit could be first tried*, and before the trial. The answer of Babbit in this case was filed in time, and the rule day for a reply expired on the 18th of January. Had the case been called at any time before that date and before April 3rd, neither party could have objected to a trial on the pleadings as they stood. As no reply had been filed the new facts set out in the answer would have been taken as true, and the right of the parties determined accordingly. * * * * * * The Act of Congress does not provide for the removal of a cause at the first term, at which a trial can be had on the issues as finally settled, *but at the first term, at which the cause, as a cause, could be tried.* * * * * Under the Acts of 1866 and 1867 it was

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sufficient to remove at any time before the actual trial, *while under that of* 1875 *the election must be had at the first term at which the cause is in law triable.*

In the case of the *Pullman Car Co. v. Speck, 113 U. S. 84,* decided at the last term, this Court has again considered and re-affirmed the principle in *Babbit v. Clark.* Mr. Justice Miller
68 deliving the opinion of the Court, says:

It is not the *term* when the case stands ready for trial on the calendar, but the *term* at which it could be first tried. Not the term at which the party can no longer *delay* a trial, but the term at which it *could* first be tried. These words have no meaning if they do not mean the first term after the commencement of the suit at which a trial was in order when such trial was a thing which the urging or pursuing party had a right to look for, and to put the adversary to a showing if he desired its continuance. In the language of this Court, "The election must be made at the first term at which the cause is in law triable." (*Babbit v. Clark, 103 U. S., 106.*) In other words, at that term at which, according to the rule of procedure of the Court, whether they be statutory or
69 rules of the Courts adopted, the cause would stand for trial if the parties had taken the usual steps as to pleading and other preparations. The term at which the case is first to be tried is to be ascertained by these rules, and not by the manner in which the parties have complied with them, or have been excused for non-compliance by the Courts, or by stipulation amongst themselves."

Now let us examine the case by this rule. The complaint was filed on the 15th October, 1879, and due publication made for the absent defendants, including the defendant Caroline Carson. Publication was made on the 16th of October, and
70 under the statute (sec. 158 Code of Procedure) the time for answering expired on the 27th November. Mrs. Carson appeared by her counsel, Hon. A. G. Magrath, but neither she nor any one of the defendants having answered, the case was put on the Default Calendar No. 6, and was regularly called for trial on that calendar on the 8th December, *on which day judgment by default was actually taken against another of the defendants,* and only not taken against Mrs. Carson because of an understanding with her counsel by which she obtained further time to answer, on condition of the consent of her
71 counsel to an order of reference—which understanding was carried out by order of 16th December, 1879.

Term at which cause could first be tried.

In the case of *McComb v. Woodbury, 13 So. Ca. Rep. 149,* the Supreme Court of the State held that a case on the Default Calendar (No. 6) was properly triable on the day on which it was called (5th December, 1879), and that the cases then heard and decided were properly tried, and the judgments rendered valid.

The judgment by default in an action under the Code, in 72
the nature of a suit in equity, is analogous to an order *pro confesso* under the equity practice, the effect of which is to admit the statements in the complaint, but still to allow the defendant against whom it is taken to contend to the Court that, admitting allegations, the plaintiff has no equity. In other words, that the case was then and there triable on the statement of the complaint, just as the case of *Babbit v. Clark* was triable on the statement of the answer. *Dan. Ch. Pl. and Pr. 577. Southern S. P. Co. v. Rogers, Cheves' Ch. R. 53. Pendleton v. Evans, 4 Wash. Cr. Rep., 336.* 73

The cause then being triable at the November term of the Court, 1879, Mrs. Carson's counsel obtained further time to answer, which postponed the hearing of the case, until after that term had expired; but on doing so her counsel consented to an order of reference to one of the masters of the Court. This order of reference was in itself a decree in the cause. See *Maddock's Chan., 455. Seaton's Forms 11. Gresley's Eq. Evidence, 385. Dan'l Ch. Pl. & Pr. p.* 1347.

The case comes then clearly within the rule of *Babbit v. Clark* and the *Pullman Car Co. v. Speck*, and the application 74
not having been made at the November term, 1879, was not made by Mrs. Carson "at or before the term at which the cause could be first tried," and was therefore too late when made after the adjournment.

(*b.*) But, again, the application for removal of the case came too late because it was not made "*before the trial thereof;*" the application was not made, indeed, until the trial had commenced and had regularly progressed in the orderly course of proceeding up to the close of plaintiff's case. 75

As Judge Dillon in his work observes, it is clearly too late

to apply for the removal after the trial has once begun (*Removal of Causes, p. 58*), and the only question has been: When is it to be said that a trial has begun?

Let us first inquire: What is a trial? Trial is thus defined by the elementary authorities:

76 *Jacob's Law Dictionary:*

"TRIAL *is the examination of the matter of fact in issue*, of which there are many different species, according to the difference of the subject to be tried."

Bouvier's Law Dictionary:

"TRIAL in Practice. *The examination* before a competent tribunal, according to the laws of the land, of *the facts* put in issue in a cause for the purpose of determining such issue."

Burril's Law Dictionary:

77 "TRIAL. *The examination* before a competent tribunal, according to the laws of the land, of *the facts* put in issue in a cause for the purpose of determining such issue; the examination and decision of an issue of fact by a jury under the supervision of the Court."

Blackstone, Vol. 3, p. 330:

"Trial, then, is *the examination of the matter of fact in issue*, of which there are many different species, according to the difference of the subject or thing to be tried."

Stephen on Pleading, Note 29, Appendix:

78 "Trial has been long used to express the investigation of fact only."

In Hargrave's Law Tracts, p. 303, in "A Treatise of the Maisters of the Chauncerie," he writes:

"I find, also, that the examination of witnesses for *tryale* of matters dependinge in chauncerie, hath been a peice of ther charge and care, when those examinations were taken owt of the Court in other parts of the realme."

In the introduction to Jeremy Bentham's *Treatise on the Equity Jurisdiction*, it is said:

79 "This Court, then, it will be found, in exercising its authority in relation to trusts, peculiarly so-called, and on some other subjects which

it would be premature to introduce here, admits, in some cases of the application of its *modes of proof and of trial*, and of relief in supporting a jurisdiction wholly independent of the Courts of Law. * * * * * * * * * The modes of *proof and of trial* and of relief, however, &c., &c., &c.

And again, introductory to the chapter treating of references to the Master, at *p. 292, Part 1, Book 3d*, it is said: 80

"The modes of *proof and of trial* here adopted are, as to such part of the same, of general application; but that, of course, is not the case with regard to its means of relief."

A trial in an equity cause has, therefore, certainly commenced when, upon a reference to a Master, the examination of the matter of fact has commenced and progressed before him.

Immediately after the passage of the Act of 1875, a case arose before Judge Woods, the Circuit Judge, now of this Court, involving the question when a trial must be said to 81 have commenced, and in deciding it, Judge Woods says, *Lewis v. Smythe, 2 Woods, p. 119:*

"No argument or decision of questions merely preliminary, or questions of pleading, except such as settle and end the case (as where the facts are admitted and the case turns upon the law as applied to the facts) is meant by the word 'trial.' It involves the facts of the case, *and whenever the investigation of the facts of a case simply, or the facts in connection with the law*, is entered upon by the Court alone, or by the Court and jury, *the trial may be said to have begun.*"

The same point has since been twice before the U. S. Su- 82 preme Court. In the first, the *Removal Causes, 100 U. S. 473*, the Chief Justice, delivering the opinion of the Court, says:

"We agree that, as a general rule, the petition must be filed in a way that it may be said to have been in law presented to the Court, before the trial is in good faith entered upon. There may be exceptions to this rule, but we think it clear that Congress did not intend, by the expression 'before trial,' to allow a party to experiment on his case in the State Courts, and, if he met with unexpected difficulties, stop the proceedings and take his suit to another tribunal. But to bar the right of removal, it must appear that the trial had actually begun, and was in progress in the orderly course of proceedings when the application 83 was made. No mere attempt of one party to get himself on the record

as having begun the trial, will be enough. The case must be actually on trial by the Court, all the parties acting in good faith, before the right of removal is gone."

In the next case, *Jifkins v. Sweetzer, 103 U. S., 179*, the Chief Justice again reviews the subject, and says:

84 "The Act of 1875 requires that the petition for removal shall be filed 'before the trial.' This we held, in the *Removal Cases, (100 U. S., 457)*, meant 'before the trial is in good faith entered upon.' If the *trial had actually begun, and was in progress in the orderly course of proceeding when the petition was presented, it would be too late.* * * * He must make his election before he goes to the trial or hearing on the merits.

"It seems to us clear that if the Court of Common Pleas had, in the first instance, decided the issue raised by the pleadings in favor of the appellants, and sent the case to a Master to state the accounts, no removal could have been effected after that. *The final hearing was entered upon when in the orderly course of proceedings the issue made by the pleadings was submitted to the Court for judicial determination.*"

85 Now, what were the facts in this case? The defendant, Mrs. Carson, having appeared by her counsel, but having failed to answer, when the time for her answering expired, she comes into Court on the 16th December, 1879, and consents to an order of reference to the Master, and obtains further time to answer. On the 31st January, 1880, she files her answer, and on the 3d February the references are commenced. (*Record, p. 15*). On that day she appeared before the Master, and the pleadings are read, her counsel, Judge Magrath, reading her answer, and filing an exhibit to it. (*Record, p. 15, f. 28.*) On
86 the 6th February another reference is held, at which the documentary evidence on both sides is put in—Judge Magrath, on behalf of Mrs. Carson, putting in evidence the will of W. A. Carson and his executors' accounts (*Record, p. 15*), and the plaintiffs proceeding with the examination of their witnesses. Another reference is held on the 10th February, in which the plaintiffs introduce and examine another witness, and thereupon close their case. (*Record, p. 16.*) On the 16th February the petition for removal is filed.

The facts just stated show the case to be very like that of
87 *Lewis v. Smythe*, cited above, and on which Judge Woods observes:

Petition not Properly Verified.

"It seems to me too clear for argument that the petition for removal must be filed before the trial commences. The filing of such a petition during the trial, while it is in progress, is not a filing before the trial. To hold otherwise would be to allow a party to experiment with the Court by going into the trial, and if the rulings of the Court were not favorable, or the prospects of a propitious result good, to interrupt the proceeding by a transfer of the cause to another forum. Some cases occupy several weeks in their trial. It could hardly be in the contemplation of the Act of Congress to allow a party after he has occupied 88
the attention of the Court, or the Court and jury, for days, it may be for weeks, with the trial of a cause, to interrupt the proceedings by a transfer of the cause to another Court, &c., &c.

As the petition had not been filed then before the trial had actually begun, Judge Pressley did not err in refusing the removal.

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3. But if the petition had been filed in time, did it show that Mrs. Carson was entitled to the removal of the cause by reason 89
of her citizenship?

As we have seen, the well settled rule is, that the State Court, having acquired jurisdiction, is not called upon to surrender it, unless the facts stated in the petition, taken in connection with such as already appeared in the record, showed that she was entitled to such transfer by reason of her citizenship.

The first thing, which probably struck Judge Pressley as he looked at the petition presented, was the fact, which will not, we think, be without its weight with this Court, that the peti- 90
tion is not signed by Mrs. Carson herself, but is signed by only *one* of her counsel; that Judge Magrath, who had appeared for her and signed her answer, does not sign this petition; that it is signed only by Mr. Lowndes; and Judge Pressley calls attention to the fact, too, that the affidavit is not properly verified by Mr. Lowndes, who signs it, to wit: it was sworn to before a Notary Public of the District of Columbia, but such officer was not authorized to take depositions or administer oaths to be used in evidence in the Courts of South Carolina. To this it will probably be said that it has been 91
held that the petition is not required to be verified. There

have undoubtedly been such decisions by State and Circuit Courts, but none by the Supreme Court of the United States. On the contrary, as we have seen, that Court attaches great weight to the affidavit, and assumes that the petition will be accompanied by an affidavit. (*Yulee vs. Vose, supra.*) But whether or not it is essential that the petition shall be accom-
92 panied by an affidavit, when the affidavit is offered the State Court has a right to examine it, and it is to be taken as a part of the petition—as one and the same instrument. (*Ibidem.*)

If Mr. Lowndes had signed a petition baldly asserting that Mrs. Carson was a citizen of Massachusetts, without more, and had there been no contradiction of this assertion under his own hand and that of his associate counsel, it may, possibly with less objection, have been urged that the State Court was bound to accept the case as made on the face of the petition. But, as we shall see directly, there was direct contra-
93 diction of the statement of the petition under the signature of both Mr. Lowndes and Judge Magrath, and upon the evidence put into this case by them Mr. Lowndes was too prudent to make any such bald statement. He would not assume the professional and personal responsibility of stating that Mrs. Carson was a citizen of Massachusetts without accompanying his statement with an affidavit giving the ground on which he based it—thus avoiding himself the responsibility of the assertion, and putting upon the Court the burden of deciding for itself whether or not, *upon the facts* of his affidavit,
94 she was a citizen of that State. We may observe here that this Court warmly reprobates the idea that a Court should be expected, by argumentative inferences, to ascertain the fact, vital to its jurisdiction, of the citizenship of a party. (*See Robertson v. Cease, 97 U. S., at p. 650.*)

As we have seen, before Judge Pressley should give up the jurisdiction of the Court, it was his duty to examine the petition and affidavit as one instrument, and to take them in connection with the other parts of the record, and with such facts as already appeared in the case to see if she was entitled to
95 removal because of her citizenship of the State of Massachusetts. (*Railway Co. v. Ramsay; Insurance Co. v. Peckner; Amory v.*

Amory; Gold Washing Co. v. Keyes; Yulee v. Vose; Removal Causes, supra.) Now, in looking into the record, his Honor found that in her answer filed but two weeks before her petition, Mrs. Carson had stated as follows: (*Record, p. 9, f. 19.*)

"That defendant, who during the late war adhered to the cause of the Union, early in 1861 left South Carolina, *and went to New York, where she has ever since resided and had her domicile, &c.* 96

The answer was signed by Mr. Lowndes and Judge Magrath, and filed on the 31st January. (P. 11, f. 22.) On the 3d February, at a reference before Master Clancy, Judge Magrath filed the record in the case of *Carson v. Robertson, et al., U. S. Court*, as an exhibit to the answer of Mrs. Carson, and at another reference held on the 6th February (p. 15), he admits as in evidence for the plaintiffs certain portion of the exhibit. In turning then to this exhibit, it is found that Mrs. Carson had on the 11th August, 1866, filed a bill in the 97
United States Circuit Court at Charleston, in which she describes herself as "*Caroline Carson of the City of New York and a citizen of the State of New York;* that the subpœna ran to require the defendants to answer to the "bill of complaint of *Caroline Carson, a citizen of New York.*" (*Record in Carson v. Robertson, pp. 1 and 7.*) That on the 13th August, 1874, she filed an amended bill in which she again describes herself as "*Caroline Carson, a citizen of the State of New York*" (*Record in Carson v. Robertson, p. 68*), and that on the 13th of October, 1876, she filed a supplemental bill in which 98
she yet again describes herself as "*Caroline Carson, a citizen of New York.*" (*Record, Carson v. Robertson, p. 96.*)

Here then we have Mrs. Carson in 1866, 1874, 1876, and down to 31st January, 1880, declaring that she was and is a citizen of New York, and we have each declaration signed by Mr. Lowndes and Judge Magrath; and against their repeated and solemn declarations we now have Mr. Lowndes' claim that she is, and was in the meantime, a citizen of Massachusetts, made, as he was careful to do, without responsibility upon himself, but upon statements on which he sought 99
to induce the Court to act.

However earnestly it was originally questioned, there is no doubt that the rule is now fully settled that it is competent for a party to make a change of domicile for the purpose of giving jurisdiction to the Federal Courts, where it could not otherwise exist, and, indeed, in the case of *Robertson v. Carson*, the Supreme Court went so far as to suggest this course
100 to Mrs. Carson, in order that she might bring Hyatt into the case in the United States Courts. (See *19 Wallace, at p. 106.*) But the change to give jurisdiction must be *bona fide*, absolute and unconditional, and the person claiming to have made the change for this purpose must recollect that in doing so she subjects the good faith of the transaction to suspicion. (*Gardner v. Sharp, 4 Washington Circuit Report, p. 614.*) And that her motive is "a circumstance to call in question the *bona fides* and reality of the removal or change of domicile." (*Briggs v. French. 2 Sumner Cir. Rep., p. 255.*) And that "where a
101 change of domicile is alleged, the burden of proof rests upon the party making the allegation." (*Desmare v. United States, 93 U. S., p. 605.*) Bearing in mind these rules, let us look at the authorities upon the point of citizenship as it affects the jurisdiction of the United States Courts.

In the early case of *Cooper v. Gailbraith, 3 Washington Cir. Rep., p. 535*, Washington, J., says:

* * * "To give jurisdiction to the Courts of the United States, the suit must be between citizens *residing* in different States," etc.

And in the case of *Gardner v. Sharp, supra*, he there states
102 the rule more fully:

"In reference to the jurisdiction of the Courts of the United States, citizenship means *domicile—home—permanent residence.* When a citizen of one State removes to another, and a question of jurisdiction arises, it must be decided by the *quo animo* which induced the removal. If it was to remain permanently in the State to which he has emigrated, it amounts to a change of domicile and of citizenship. If it was merely for a temporary purpose, he can be considered only as a sojourner in the State to which he has gone."

What is a domicile? It is defined thus. *Vattel's* definition is:

103 "A habitation fixed in any place with an intention of always staying there."

Jacob's Law Dictionary:

"*Domicile*—The place where a man has his home."

Bouvier's Law Dictionary:

"*Domicile*—The place where a man has his true, fixed and permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning."

Burrell's Law Dictionary: 104

"*Domicile*—The place in which a person has taken up his permanent residence, and to which, when he is absent from it, he has the intention of returning."

See also *Story's Conflict of Laws*, §41.

In the case of *Whicker v. Hume*, *Vol. VII, H. L. Cases, p. 160*, Lord Cranworth thus well observes:

"By domicile we mean home, the permanent home; and if you do not understand your permanent home, I am afraid that no illustration drawn from foreign writers or foreign languages will very much help you to it. I think the best I have ever heard is one which describes the home as the place (I believe there is one definition in which the *lares* are alluded to), the place '*unde non sit discessurus si nihil avocet; unde cum profectus est, peregrinari videtur.*'" 105

There are two criteria upon which the Courts have settled as determining the question of domicile: (1) *residence*, the *fact* of residence; and (2) the *intention* or purpose of residence—*factum et animus*. It is well settled that residence without *animo manendi* does not effect a change of domicile, and equally so that a mere intention, without the fact of residence, will not accomplish the purpose. This was held by 106 the Vice-Chancellor, Sir John Leach, in the case of *Munroe v. Douglass, 5 Maddox Ch., 405:*

"A domicile cannot be lost by mere abandonment. It is not to be defeated *animo* merely, but *animo et facto*, and necessarily remains until the subsequent domicile be acquired, unless the party die *in itinere* toward an intended domicile."

In the case of *DeBonneval v. DeBonneval, 1 Curteis' Eng. Ec. Rep., 856*, Sir Herbert Jenner says:

* * * "The change of domicile must be manifested *animo et facto*, 107 by the *fact* of residence and the intention to abandon the former residence."

And, again, in *Craig v. Lewin, 3 Curteis, 435*, he says:

"The important question is what is necessary to constitute a change of domicile. There must be both *animus et factum*."

Sir John Nicholl in *Curlevy v. Thomlin, 2 Adams, 6:*

"Mere *averments* of intention not deducible from the *facts* pleaded are of no avail whatever in the cause."

108 The Courts of Massachusetts have repeatedly announced the same doctrine. In *Jennison v. Hepgood, 10 Pick, 77*, Wilde, J., commenting upon the facts before him, says:

"But *whatever might have been the testator's intention*, there is no satisfactory evidence to show that a new domicile was acquired. He had no establishment in Vermont. When he was there he generally was a boarder with Gates, but he led a wandering life, and there is nothing to show that he intended to fix himself at any particular place."

And, again, in *Holmes v. Green and others, 7 Gray, 299–*
109 *301*, Judge Bigelow says:

"But *no case can be found where the domicile of a party has been made to depend on a bald intent, unaided by other* proof. The *factum* and the *animus* must concur to establish a domicile. *Harvard College vs. Gore. 5 Pick, 370.* The latter may be inferred from the former. But evidence of mere intent cannot establish the fact of domicile."

In *Lyman v. Fiske, 17 Pick, 231*, Chief Justice Shaw says:

"It is difficult to give an exact definition of habitancy. * * * * It is manifest, therefore, that it embraces the *fact* of residence at a place with the intent to regard it and make it his home. *The act and intent*
110 *must concur*, and the intent may be inferred from the declaration and conduct."

And yet, again, in *Shaw v. Shaw, 98 Mass., 160*, Foster, J., says:

"Every one must have a domicile somewhere, and a domicile once existing cannot be lost by mere abandonment, even when coupled with the intent to acquire a new one, but continues until a new one is in fact gained. * * * * The former domicile remains until both the intent *and fact of change of actual residence to another place has concurred* to establish a new domicile there."

111 The same has been held in Maryland. In *Reynold et. al., v. Bailey, 5 Maryland, 193*, Mason, J., says:

"*The mere intent to acquire a new domicile without the fact* of an actual removal avails nothing, neither does the fact of removal without the intent.

And this rule has been adopted by this Court. In *Ennis v. Smith, 14 How, 423*, Wayne, J., says:

"It is difficult to lay down any rule under which every instance of residence could be brought which may make a domicile of choice. But 112
there must be to constitute it *actual residence in the place* with the intention that it is to be a principal and permanent residence."

Having seen, then, that in order to establish a change of domicile there must have been an actual change of residence, coupled with an intention of permanent residence at the new domicile—the *factum et animus*—let us next look at the authorities upon the point how this fact of residence and intention are to be established.

In the case of *Butler v. Farnsworth, 4th Washington C. C., p. 103*, already cited, Judge Washington says: 113

"The question of law arising upon the particular facts of each case must always be: Has the person so removing become incorporated into the new society so as to be a member of it, in like manner as he was of the political family from which he emigrated? In other words, has he changed his domicile and become a permanent resident in the State to which he has removed? Mere residence is *prima facie* evidence of such a change; although when it is explained and shown to have been for mere temporary purposes, the presumption is repelled.

"It is true that the intention of the party in changing the place of his residence is a material ingredient in the question of citizenship as it concerns Federal jurisdiction. But the intention is to be collected from the *acts*, and not from the *declarations* of the party." * * * * * * 114
* * "It is a conclusion of law upon certain facts which constitutes him a citizen of the State where he permanently resides; which neither his private intention nor his public declaration can alter."

Again, in the case of *Prentiss, Trustee, v. Barton, Executor, 1 Brock, p. 393*, Chief Justice Marshall, on the Circuit, held:

"All agree that a new residence is not acquired by a residence for temporary purposes. It must be a permanent residence. Vattel defines it to be 'a habitation fixed in any place, with an intention of always staying there.' *The existence of this intention must be manifested by overt acts*, in explanation of which, if doubtful, the declaration of the 115
party will undoubtedly be received."

And so this Court, in *Shelton v. Tiffin, 6 Howard, p. 185*, McLean, J., delivering the opinion, says:

"On a change of domicile from one State to another, citizenship may depend upon the intention of the individual. *But this intention may be shown more satisfactorily by acts than declarations.*"

116 See also *Story's Conflict of Laws*, § 44, and the case of *Colburn v. Holland, 14 Rich, Eq., 231.*

The Courts of England attach no more consequence to mere declaration in regard to domicile than do the Courts of the United States. In the case of *Brown v. Smith, 15 Bevan 448*, Sir John Romilly says:

"Now there is nothing more clear than this, that the mere declaration of intention to change a domicile without an actual change of residence is inoperative to create a new domicile; therefore, the Court must disregard any expressed intention which has not been carried into
117 effect."

In *Wilson v. Wilson, Law Rep., 2 Prob. & Div., 435* (*4th Moake, 435*), it was held (head note):

"The oath of the person whose domicile is in question as to his intention to change his domicile is not conclusive, but the question for the Court is whether, upon a review of all the circumstances, it gives credit to his evidence."

See also *Jacobs & Fisher's Digest, 3 Vol., 4,225:*

118 "Conversations and declarations, unless accompanying acts, are the lowest species of evidence of a change of domicile; they must not, however, be disregarded, but must be duly weighed with the rest of the evidence," citing *Crookenden vs. Fuller, 1 St. T., 441.*

See also note to *Countess of Dalhousie v. McDonal, 7 Cl. & Fin. (Perkin's Am. Ed.), 817*, and note to *12th Ed. Kent Com., 2 Vol., 430.*

With this review of the authorities upon the subject, let us now examine Mr. Lowndes' affidavit, and see if any Court
119 could have held that Mrs. Carson had changed her citizenship upon the facts stated therein.

The facts which Mr. Lowndes states, are:

1. That about the 1st July, 1877, he received a letter from Mrs. Carson, dated at Brookline, Massachusetts, in which she informed him that she had made a declaration or affidavit of her change of domicile from New York to Massachusetts.

2. That he continued to receive letters from her "*in the latter State*," during the month of July, 1877. 120

3. That he knew her purpose to have become a citizen of Massachusetts.

4. That she has not in fact resided for many years in New York.

It is not necessary to do more than call attention to the incompetency of Mr. Lowndes' testifying to the contents of a letter which he does not even say that he has lost, instead of producing the letter itself, the more especially when that letter is said to refer to another instrument in writing which itself is not produced. But not to dwell upon this vio- 121
lation of the most elementary principles of evidence, further than to point it out and to insist upon its rejection, let us suppose for the sake of argument that the letter and declaration had been regularly produced and proved. What of it? It would at best be but the mere declaration of a bald intent. But as we have seen the intent (the *animus*) without residence (*the factum*) will not answer; nor can intent be established by mere declaration, without accompanying acts.

The jurisdiction of the United States Court is only between citizens *residing* in different States. (*Cooper v. Gailbraith.*) 122
Mr. Lowndes does not pretend that Mrs. Carson ever *resided* in Massachusetts. The citizenship of the Court of the United States means domicile, home, permanent residence. (*Gardner v. Sharp.*) Mr. Lowndes does not say that Mrs. Carson ever had a home or permanent residence in Massachusetts. On the contrary, his affidavit itself negatives the idea that she had. He received a letter from her on the 1st July, 1877, dated at Brookline, Massachusetts, and "continued to receive letters from her *in the latter State* during the July of 1877." It is manifest from the context of the letter that Mrs. Carson had 123
no "domicile," "home," "establishment," or "permanent resi-

dence" in Massachusetts, but was moving from place to place. We do not think that Lord Cranworth would undertake to explain what we mean by domicile to one who would be satisfied with Mr. Lowndes' affidavit as establishing a home in Massachusetts for Mrs. Carson. (*Whicker v. Hume.*) Whatever might have been Mrs. Carson's intention, there is not a particle of
124 evidence to show that she had acquired a new home or domicile (*Tennison v. Hepgood*), and no case can be found where the domicile of a party has been made to depend on a bald intent, unaided by other proof. (*Holmes v. Green.*) Intention may be taken as sponsor for future conduct. It can never supply or contradict the facts of the past. Mrs. Carson having established her domicile in New York, it could not be changed until both the *intents* and *facts* of change of actual residence had occurred and concurred.

4. That the allegations of the petition, taken in connection
125 *with the other parts of the record, were contradictory thereto.*

The whole of the theory of Mrs. Carson's change of citizenship is manifestedly an after thought. The change is alleged to have taken place about the 1st of July, 1877 (*Record, p. 41, f. 152*). This was nine months before the case was last argued on its merits before the United States Circuit Court. Judge Bond's decree of foreclosure was made on the 10th May, 1878. (*Record, p. 32, f. 123, p. 33, f. 127.*) Now, surely, if Mrs. Carson and her counsel had considered that she had changed her residence in the July previous, she would
126 then have followed Judge Swayne's advice and made Hyatt a party to her proceedings in the United States Court, and thus have bound and concluded him, and put an end to the litigation. Her not having done so is conclusive that she did not then believe that she had carried out any purpose she may have had to change her domicile. It may be that she had intended to have done so, but that, when she became advised that the *animus et factum* must concur, and that she must remain in Brookline as a resident in order to sustain her right to citizenship in Massachusetts, she abandoned her intention. But however that may be, there is no proof that she
127 did carry out her intention. On the contrary, her counsel in the answer in the cause, in the State Court, filed on the 30th

January, 1880, make her declare that she was then still a citizen of New York. The language of her answer, drawn and signed by Mr. Lowndes, is circumstantial and explicit:

4. "The defendant, who during the late war adhered to the cause of the Union, early in 1861 left South Carolina and went to New York, *where she has ever since resided and had her domicile.*"

There can be no mistake as to the averment—it was evi- 128
dently made with care and precision. Mr. Lowndes did not believe then, when he drafted and signed that answer, any thing in the theory of Mrs. Carson having changed her residence.

II.

Did the State Court refuse to give validity and effect to the judgment of the Circuit Court of the United States in favor of the appellant?

129

(*a*). The argument in support of this proposition, that the State Court refused to give validity and effect to the judgment of the Circuit Court of the United States, has been based upon the assumption of a fact which was not established before the State Court, to wit, that Mrs. Carson holds "title from the Marshal of the United States for the District of South Carolina, at the sale of the said property under the order of the Circuit Court of the United States." (*Trans. Record, p. 27. f. 47.*)

It was never shown to the State Court that Mrs. Carson 130
held title under a sale by the Marshal.

She was made a party to the complaint of Hyatt, under allegation upon information that she had obtained a decree setting up the mortgage given by Ball to the executors of Carson for a part of the purchase money of Dean Hall. (*Trans. Record, p. 7, f. 16.*)

In her answer, it is true, she states that this decree was for $31,000 (*Trans. Record, p. 9, f. 19*), and that, in pursuance of said decree, Dean Hall was sold to her by the Marshal of the District of South Carolina, on the 26th November, 1879. 131
(*Trans. Record, p. 11.*) But she did not support this answer

by evidence. At the Reference on February 6, 1880, Judge Magrath put in evidence, "from the printed brief in Carson v. Robertson, *et al.*, to wit, the mortgage of Elias Ball to the executors of Carson, p. 39." (*Trans. Record, p.* 15, *f.* 28.) But this is all the testimony put in for Mrs. Carson. The plaintiffs closed their case on February 10, and at the next Reference,
132 February 16, instead of proceeding with the testimony for the defence, as was expected, Judge Magrath refused to go on, stating that he had that day filed a petition for the removal of the cause. (*Trans. Record, p.* 16, *f.* 30.)

The cause, therefore, stood upon the testimony for the plaintiffs, and the only evidence for the defendant, the copy of the mortgage from the printed record of the case of *McBurney v. Carson.*

Nor was this omission of evidence supplied by the answer of the defendant, Mrs. Carson, for her answer was not under
133 oath.

Dan'l Chan. Pl. & Pr., 985, note:

"Where an answer *on oath* is waived, the answer is not evidence in favor of the defendant for any purpose; but the plaintiff may avail himself of the admissions and allegations contained therein, which establish the case made by the bill."

See also *Union Bank of Georgetown v. Geary, 5 Peters,* 111 and 112.

Bartlett v. Gage, 4 Page, 403.

We submit, therefore, that this Court cannot review the
134 decision of the State Court on the ground that that Court refused to give effect to a title which was not set up before it. This Court, we are sure, will say, as it said in the *Insurance Co. v. Peckner*, that the State Court had the right to take the case as made by the party himself, and not inquire further.

(*b*). But supposing that Mrs. Carson had shown to the State Court that she had purchased the property and held the Marshal's title, did the State Court, even under that supposition, refuse to give effect to the judgment of the Circuit Court of the United States in favor of the defendant?

135 To maintain the affirmative of this question, the appellant in the argument before the Supreme Court of the State relied

principally upon the cases of *DuPasseur v. Rochereau, 21 Wall, 134, and Green v. Von Buskirk, 5 Wall, 307.*

The case of *DuPasseur v. Rochereau* was certainly in the appellant's favor as to her right to appeal to this Court *to examine* the question whether or not the State Court had disallowed the validity and effect of the judgment which she had obtained in the Circuit Court of the United States, and under which, as it is said, she had purchased in the plantation. 136

It is an authority *in her favor* as to her right to the writ of error to the State Court. It is an authority in *Hyatt's favor* that the State Court did *not* refuse to give validity and effect to the judgment obtained in the Circuit Court of the United States.

The appellant's counsel urged before the State court that the case of *DuPasseur v. Rochereau* "is especially important on account of its similarity to the present." The cases are no doubt very similar, as will appear by this comparison: 137

DuPasseur v. Rochereau.	*Carson v Ex'r Hyatt.*
DuPasseur having had a first mortgage on Sauve's land for the purchase money, foreclosed it in the Circuit Court of the United States and bought in the land.	Carson having had a first mortgage on Ball's land for purchase money, foreclosed it in the Circuit Court of the United States and bought in the land.
Rochereau held a second mortgage, but was not made a party to the proceedings in the U. S. Court. He instituted proceedings in the State Court to foreclose against DuPasseur as tenant in possession.	Hyatt held a second mortgage, but was not made a party to the proceedings in the U. S. Courts. His executors instituted proceedings in the State Court to foreclose against Carson as tenant in possession. 138
DuPasseur pleaded title under decree of U. S. Court as bar to action.	Carson pleaded title under the decree of U. S. Court as bar to action.
The State Court held that Rochereau, not having been a party to the suit in the U. S. Court, was not bound by its decree, and might maintain his action to foreclose the second mortgage notwithstanding. And upon the merits decided that DuPasseur's mortgage, not having been re-inscribed as provided by the statute, had lost priority, and decreed for Rochereau.	The State Court held that Hyatt not having been a party to the suit in the U. S. Courts, was not bound by its decree, and might maintain her action to foreclose his second mortgage notwithstanding. And upon the merits decided that Carson's mortgage had been paid and satisfied and decreed for executors of Hyatt. 139

In each of these cases it is seen that proceedings were had in the United States Court to foreclose a first mortgage—a mortgage given for the purchase money—without making the second mortgagee a party. In each, as it is said, the plaintiff purchased at the sale and obtained the conveyance of the U. S. Marshal. In each the second mortgagee subsequently instituted
140 suit in the State Court to foreclose his mortgage against the party who had held the first mortgage and had purchased in the property under the decree in his favor. In each the party pleaded title under the decree of the United States Court as a bar to the action in the State Court; and in each the plea was overruled, as the second mortgagee had not been a party to the proceedings in that Court; and in each the second mortgagee obtained a decree for foreclosure on the ground that the first mortgage had lost its lien. And in each, from the decree affirmed by the highest Court in the State, an appeal is taken
141 to this Court under the Act of February 5th, 1867.

Now what did this Court say in *DuPasseur v. Rochereau?* Mr. Justice Bradley, delivering the opinion, after declaring that the Court could not hesitate as to their jurisdiction to hear the case, then states the question for the Court to consider—

"We are bound to inquire, therefore, whether the judgment of the Circuit Court thus brought in question would have the effect of binding and concluding Rochereau if it had been rendered in a State Court. We have examined this question with some care, and have come to the conclusion that it would not.

"The same general rule of law and justice prevails in Louisiana as
142 elsewhere, to the effect that no persons are bound by a judgment or decree, except those who are parties to it and have had an opportunity of presenting their rights."

The only apparent exception to this rule, his Honor says, is the effect of a proceeding *in rem*, which he then points out is more apparent than real; and after discussing whether, under the law of Louisiana, the proceedings in the case were proceedings *in rem*, and concluding that they were not, he proceeds:

143 "Then was Rochereau a subsequent mortgagee to DuPasseur? Was the latter entitled to priority? If so, Rochereau would be bound by

the judgment, though not made a party. But he contends that his is the prior lien, and not the subsequent one. * * * * * * * * * *

Now that is the very point in dispute. Rochereau insists that, by the non-inscription of the Jacob's mortgage within ten years, it lost its rank and became the subsequent and not the prior mortgage. Grant that Rochereau was the subsequent mortgagee, and all that the appellant claims would necessarily follow. But that point is not granted; on the contrary, it is the very matter in dispute, and on this vital point we think that Rochereau was not concluded by the judgment of the 144
Circuit Court because he was not a party to it. *Therefore, the State Court, in not regarding the decision of the Circuit Court as decisive of that question, did not refuse to that decision its due and legal effect.*"

So in this case, grant that the executors of Carson have a prior mortgage, and we could not question Mrs. Carson's title to Dean Hall. But that is the very fact which Hyatt denies—it is the very matter in dispute; and just as this Court held that Rochereau could show that DuPasseur's mortgage had lost its priority by non-inscription, so it will hold again, as it has already held in this very case, that Hyatt 145
was free to show that Mrs. Carson's mortgage had lost its priority by having been paid and satisfied.

This very point, it will be remembered, has been twice decided by this Court, Mr. Justice Swayne, in the first appeal in *Carson vs. Robertson*, in 1874 (*19 Wall., 106*), saying:

"It appears that Hyatt has released his interest to his copartners, but it also appears that they have given him a mortgage upon the premises to secure the payment of $40,000. *If he shall not be made a party, and the complainant shall be successful, his rights will not be affected by the decree. In such case he can file a new and independent bill, and renew the litigation* AS TO ALL QUESTIONS TOUCHING THE PRIOR MORTGAGE, *which* 146
are involved in the controversy."

And again, the same Justice, in the second appeal in that case (*McBurney vs. Carson, 99 U. S., 569*), alluding to the first, says:

"This Court held that Hyatt was not an indispensable party, *as the decree would not affect his rights.* * * * * We hold, as we held before, that Hyatt is not an indispensable party."

Mrs. Carson's counsel endeavored to dispose of these reiterated decisions of this Court upon this point, by calling them 147
obiter. They urged in their printed arguments before the State Court:

That Hyatt was not an indispensable party, is the judgment of the Supreme Court.

"*That Hyatt could open all questions settled in Carson vs. Robertson, was pure obiter, as the point was not before the Court.*"

It is thus seen that this Court labors under the disadvantage of having the learned counsel for Mrs. Carson to differ with them as to the propriety of their decision in her favor, and is
148 corrected wherein it erred. But if this Court did commit an error, it did not do so intentionally, for it took the trouble to refer to the authorities on which it rested its opinion that Hyatt, if not made a party, might file a new and independent bill, and renew the litigation as to all the questions touching the prior mortgage, which were involved in this controversy.

Mr. Justice Swayne cited as authority for the decision of this Court, *Haines vs. Beach, 3 Johnson's Chancery, 459; Ensworth vs. Lambert, 4 Id., 605; Judson vs. Emanuel, 1 Alabama, N. S., 598; Brainard vs. Cooper, 10 N. Y., 356; Story's Equity*
149 *Pleadings*, § 192

On referring to these cases, we find that in the first, *Haines vs. Beach*, Chancellor Kent says:

"It was the duty of Gardner to have made the younger mortgagee a party to his bill, and all encumbrancers existing at the commencement of the suit are entitled to be parties, for they have an interest to be affected, and ought to have an opportunity of paying off the prior incumbrances. The injustice that would be produced, if they were to loose their rights because they are not parties, is very apparent. *The rule, therefore, has been well settled, and uniformly supported, that the subsequent incumbrancers must be parties, and if omitted the decree will not bind*
150 *their rights.* * * * * * But their rights cannot be destroyed in this way, and the purchaser will take only a title *as against the parties to the suit*, and *he cannot set it up against the subsisting equity if those encumbrancers are not parties.*"

And in the second, *Ensworth vs. Lambert*, the same great authority ordered the proceedings should be stayed, and that G. A.—the holder of a second mortgage—should be brought into Court, saying:

"As it was a fixed rule, and essential to justice, that no decree should pass until all necessary parties were brought in, all encum-
151 brancers existing at the commencement of the suit must be made parties, *or else their rights will not be affected by the decree.*"

Effect of Decree of Foreclosure upon second Mortgagee not a party.

In the next, *Brainard vs. Cooper*, Gardner, J., says:

"The foreclosure of the mortgage without making the complainant—(a judgment creditor)—a party, was, it is conceded, as to him a nullity. The relation theretofore existing between the parties was unchanged by that proceeding, and was consequently subsisting in its full force at the time when the complainant offered to redeem, and at the time of the commencement of this suit."

152

On reference to Story's Eq. Pl., to which his Honor referred, we find the following:

* * * * "If, indeed, any incumbrancers (whether prior or subsequent) are not made parties, the decree of foreclosure does not bind them, as also a decree of a sale would not. The prior incumbrancers are not bound, because their rights are paramount to those of the foreclosing party. *The subsequent incumbrancers are not bound, because their interests would otherwise be concluded without any opportunity to assert or protect them.*"

Can it be doubted, in the face of the repeated language of this Court, and the reference to these authorities, that this Court did mean to say and to adjudge that Hyatt was not 153
bound by the decree which Mrs. Carson had obtained, and might renew the litigation in regard to the alleged prior mortgage? Nor was this Court announcing any new doctrine, to which more than a passing allusion might have been needed, had not the very point been vital to the case as it then stood. See the following additional authorities:

Washburne's Law of Real Property, Vol. 2, p. 250:

"§ * * * As a general proposition all parties in interest should be made parties to such a process (in foreclosure), since parties, though 154
interested, if not before the Court, are not bound by its decree. *A decree as to them is a mere nullity, nor are their rights affected by it.*"

4 Kent Com., 185:

* * * "The question of parties is usually more or less fluctuating, and open for discussion, It is governed in some degree by circumstances, whereas the principle, that those persons, who are interested in the subject and are not made parties to the suit, are not bound by the decree, is more steady in its operation, for it is founded on natural right."

Also: *Goodrich vs. Staples, 2 Cush., 258; Williamson vs.* 155
Field, 2 Sandf. Ch., 533; Goodman v. White, 26 Conn., 317;

Effect of Decree of Foreclosure upon second Mortgagee not a party.

Kirkhan v. Dupont, 14 Cal., 559; Grattan v. Wiggins, 23 Cal., 32; Newcomb v. Dewey, Iowa, XXVII., 387; Caldwell vs. Taggart, 4 Pet., 190; Finley vs. U. S. Bank, 11 Wheat., 304; Hun vs. Lockhart, 17 Wall., 599.

If any more authority could be required, here is another one to the point by this Court itself. In the case of *Ray vs.*
156 *Norseworthy, 23 Wall., p. 128*, in which property was sold by the District Court in bankruptcy, free from all liens, in which a mortgagee had not been made a party, Mr. Justice Clifford, delivering the opinion of the Court, says:

"Concede to the fullest extent the powers of the Bankrupt Court to do anything specified in the Bankrupt Act, still it is clear that the mortgage and privilege of the petitioner could not be cancelled and displaced without notice, and without an opportunity to be heard. * * *

"No man is to be condemned without an opportunity of making a defense, or to have his property taken from him without the privilege of showing, if he can, that the pretext for doing it is unfounded," &c.

157

And yet again in the case of *Factors Co. and Ins. Co. v. Murphy, 111 U. S., 738*, the same principles are maintained. This Court, while maintaining its jurisdiction to examine the record to ascertain whether a title conferred by the United States Court in bankruptcy had been disregarded by the State Court, Mr. Justice Miller delivering the opinion says, at p. 743-744:

"The Supreme Court of Louisiana, on appeal, held that Mrs. Murphy was not a party to the proceeding in Bankruptcy, and was in no
158 sense bound by the sale of the mortgaged property, but that the sale had the effect of extinguishing and satisfying all the liens on the property but hers, and left her notes the only lien on it. * * * * * * *

"We are of opinion with the Supreme Court of Louisiana, that the record in this case does not show such service of process, or makes Mrs. Murphy such a party to the bankruptcy proceedings as binds her to the sale and discharges her lien. The case of *Ray v. Norseworthy*, 23 Wall., 128, is conclusive on that subject, and, we think, sound in principle."

As to Hyatt, then, the decree in favor of Mrs. Carson against McBurney and the others was "*a mere nullity.*" It
159 was as if it had never been made. The relations between himself and Mrs. Carson "were unchanged by that proceeding,

and were consequently subsisting in their full force * * * at the time of the commencement of the suit" by her. What were those relations? Hyatt held a mortgage upon property, which property (*before* he took *his* mortgage) had been duly discharged and released from the lien of the mortgage to Carson's executors. He held a mortgage on property, upon which Mrs. Carson was endeavoring to re-establish, revive, 160
and set up again a prior mortgage which had been cancelled.

We say and repeat, to revive and re-establish her cancelled mortgage, for it will be observed that Mrs. Carson has never produced or had the mortgage on which she sued, nor the bonds which they secured—they were satisfied and delivered up by Robertson. She sued on and put in evidence only a copy from the Register's office, not the original. (*Trans. Record, McBurney vs. Carson, Sup. Ct. U. S., pp. 39–41.*)

On the face of the record Hyatt held a mortgage on unencumbered property. The decree in Mrs. Carson's favor against 161
other parties, allowing her to revive a cancelled mortgage, could not in any wise affect Hyatt. When, then, he brought his bill to foreclose his mortgage, her work had all to be done over again as against him. She had to re-establish, revive, and again set up her cancelled mortgage. The record was with him. The burden was on her. To meet her attack on his mortgage he was free to make his own showing untrammeled by anything that had been said or done without his presence.

162

The counsel for Mrs. Carson, before the State Court, in their printed argument, used this language:

"We fear the charge of absurdity if we should seriously argue that Hyatt, who holds a mortgage from Ball's grantees (made six years after Ball's mortgage for the purchase money, *and impeached in no way*), can claim more than the right to redeem Dean Hall from such mortgage. *He has the equity of redemption, or rather, in this State, the legal right to redeem; no more.*"

This is the strongest statement of their case. But it rests 163
upon two manifest errors—one of fact, and the other of law;

(1). The error of fact is, in the *petitio principii*, the assumption that Ball's mortgage was "impeached in no way." While in fact the very question in the case has always been, was or was not that mortgage satisfied?

(2). The error of law is in the assumption that a second mortgagee has "the right to redeem, *and no more*." If he does
164 not impeach the first mortgage, this is true. But he has the right to impeach it as having lost its priority by non-registration, as in *DuPasseur v. Rochereau*—or, as in this case, to show that it has been paid.

A *fortiori* he has this right when the claim is to *re-establish* and again set up a mortgage which has already been delivered up as paid and satisfied.

As to the case of *Green vs. Van Buskirk, 5 Wall., 307*, Mr. Chief Justice Simpson, in delivering the opinion of the Su-
165 preme Court of the State, has pointed out the principle on which that decision rested, viz: That Van Buskirk was bound by the construction of the Illinois Statute by the Illinois Courts, but not by the facts of a case to which he was no party.

The appellant's reliance upon this case arises from a confusion of the different principles of *res adjudicata* and *stare decicis*.

Mr. Justice Miller, delivering the opinion of the Court in Green vs. Van Buskirk, says:

"It is said that Van Buskirk, being no party to the proceeding in Illinois, was not bound by them, but was at liberty to assert his claim
166 to the property in any form that might be open to him, and, strictly speaking, this is true. *He was not bound by way of estoppel, as he would have been if he had appeared and submitted his claim*, and contested the proceedings in attachment. He has the right to set up any title to the property which is superior to that conferred by the attachment proceedings, and he has the further right *to show that the property was not liable to the attachment—a right from which he would have been barred if he had been a party to the suit.*"

The doctrine of *res adjudicata* rests upon the principle of estoppel, and that, as Mr. Justice Miller declared, had no application in that case. But the rule of *stare decisis* came in
167 because the ruling of the Courts of Illinois upon the subject of the law of that State *was* binding as a rule of law upon all

other Courts, State or Federal, and between any parties whatsoever. Mr. Justice Miller goes on to say, therefore:

"We are of opinion that the question is to be decided by the effect given by the laws of Illinois, where the property was situated, to the proceedings in the Courts of that State under which it was sold."

The question in the case was not as to the binding efficacy of the record and adjudication as to the parties, but as to the conclusiveness of the decision of the Courts of the State upon its own laws. 168

Well might the Chief Justice of the Supreme Court of South Carolina, in delivering the opinion of the Court, say: (*Trans. Record, p. 39, f. 74.*)

"We have been somewhat surprised at the earnestness with which the appellant has pressed upon the Court the first ground of appeal (*i. e.*, that the judgment of the Supreme Court of the United States in *McBurney v. Carson, 99 U. S.*, is conclusive of the case on the principle of *res adjudicata*) in the face of the language of the decree she invokes. 169

How could the Supreme Court of the United States have expressed more distinctly its own opinion that the rights of Hyatt were not being adjudicated in the cases of Carson and Robertson, and McBurney and Hyatt, than in the following language found in their opinions:

'If he (Hyatt) shall not be made a party, and the complainant shall be successful, his rights will not be affected by the decree. In such case he can file a new and independent bill, and renew the litigation as to all the questions touching the prior mortgages which are involved in this controversy. The complainant has the option to make him a party, or to proceed without him and take the hazard of the consequences.' *Carson v. Robertson, 19 Wallace, U. S. 106.*

Could language be stronger, or more direct to the point? Again the Court said: 170

'This Court has held that Hyatt was not an indispensable party as the decree would not affect his rights.' *McBurney v. Carson, 99 U. S., 569.*"

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No other Federal question in Case.

Besides these questions of jurisdiction which we have been considering, the only others in these cases in the Federal and State Courts were, (1.) As to the use of Confederate currency as the medium of payment for the purchase of Dean Hall, and in the payment of Ball's bonds secured by the mortgage; (2.) The power of one executor to receive payment and dis-
172 charge the debt, including the question whether Robertson, in doing so, was acting as an executor or Trustee; and (3.) The question of fraud, actual or implied. But none of these are Federal questions; they each belong to that class of questions about which, in the language of the Court, the Federal Courts and the State Courts each in their own sphere, deciding on their own judgment, are not amenable to each other.

1. This has been expressly held at this very term by this Court in regard to the first.—*Kenney, Trustee, v. Effinger, 115*
173 *U. S., 577.*

In *Delmar v. The Insurance Company, 11 Wall, 665,* Mr. Justice Miller, delivering the opinion of the Court re-affirming the principle announced in *Thorington v. Smith, 1 Wall.* 1, that the notes of the Confederate States in ordinary use as money during the rebellion might constitute a valid consideration for a contract, says:

"The proposition involved in this conclusion, however, does not of itself raise one of those Federal questions which belong to this Court, to settle conclusively for all other Courts. When a decision on that point,
174 whether holding a contract valid or void, is made upon general principles by which Courts determine whether a consideration is good or bad, on principles of public policy, the decision is one we are not authorized to review. Like many other questions of the same character, the Federal Courts and the State Courts, each within their own sphere, deciding on their own judgment, are not amenable to each other."

Now, then, if Hyatt was not bound by the decree in *Carson v. McBurney,* if he was free to "file a new and independent bill, and renew the litigation as to all questions touching the prior mortgages which were in the controversy" in that case,
175 was not the State Court, into which alone he could go—as the citizenship of Mrs. Carson and himself precluded his go-

ing into the U. S. Courts—bound, or at least, free to follow the rule which it had already established on that subject? Was it not free to carry out the principles of public policy already announced as followed in a series of like cases? Has not this Court, itself, already answered this question in declaring as above, that in regard to this, like many other questions of the same character, the Federal Courts and the 176
State Courts, each within their own sphere, deciding on their own judgment, are not amenable to each other?

It will be steadily borne in mind that the line of decisions, which the State Courts followed in this case, had already been adopted before the first appeal was heard in this Court. (*See* the able review of all the State decisions upon the subject by the Chief Justice. *Trans. Record, p. 46 to p. 50.*) The fact that they had already been so adopted was urged upon this Court as a reason why it should stretch its jurisdiction as to the parties. Mr. Lowndes had urged this upon 177
this Court. He said in his Brief on the first appeal:

> "To send her (Mrs. Carson) out of these (the Federal) Courts, is *in consequence of the decisions of the State Courts of South Carolina on this class of questions* to take away from her all redress."

And what was the answer of this Court to this appeal? Did this Court say to him: Never mind that. We say it is true Hyatt is free to file a new bill and renew the litigation as to all these questions, but if he does so, and if he goes into the State Court, and they follow the decisions they have already made, we will overrule them? Not at all. This Court 178
had but recently held in the language we have quoted, and decided that the sufficiency of payment in Confederate currency was not a Federal question, and that the State Court was not amenable to this Court upon the subject. The answer they made to the appeal was to suggest to Mrs. Carson to change her citizenship, and then to make Hyatt a party to the proceedings. But this she neglected to attempt to do until too late.

2. It certainly will not be contended that the question as to 179
the right of one Executor to receive payment and enter satis-

faction on an obligation, or the question whether in doing so the person acted as executor or trustee, have in them any element of Federal jurisdiction.

3. But surely, if the State Courts are not amenable to this Court on questions relating to transactions in Confederate currency, or as to the power of executors, neither are they in
180 questions of fraud.

This Court had decided against McBurney on the ground of fraud—*actual fraud.* Mr. Justice Swayne declares:

> * * * * The Bill charges fraud, conspiracy and spoliation. *If the charge is untrue the Bill should be dismissed!* * * * * *There was evidently a plot! McBurney & Co. were its contrivers! Ball was their instrument!! Robertson was their dupe!!! and the Carsons were the victims!!!!*

Now, certainly, if Hyatt was not bound by that decree, he was free to show before the State Courts that all this was a mistake, and that the purchase of the plantation was an open,
181 honest transaction, and that the only mistake made in connection with the whole transaction was as to the investment of the money after it had been received by Robertson, for which, under the laws of the State he, the purchaser, was not responsible. In doing this before the State Courts, he had the advantage of the long established character of his former partners and himself. No one, knowing the parties, as the Chief Justice of the State declares, would for a moment believe that this business was conceived and perpetrated in fraud. But not only did they have the advantage of their
182 high established characters before the State Court, but they had the recognition of it from the counsel who argued the cause before that Court, and the repudiation by such counsel of any responsibility for Mr. Justice Swayne's attack upon their fairness and honesty in the matter.

In the printed argument filed in the State Supreme Court by "Mr. James Lowndes, with him A. G. Magrath and H. E. Young," they say:

> "For the charge of *actual* fraud against McBurney, stated in the decision of the Supreme Court of U. S., *neither Mrs. Carson, nor her coun-*
183 *sel, has any responsibility. Such charge cannot be found in any of the bills filed in the numerous cases which have grown out of this transaction.*"

But if so, as Mr. Justice Swayne declares, the bill should be dismissed! How, then, could they expect the State Court to follow the decision of this Court, when they themselves disavow and disown the very ground on which this Court rested its decision?

Surely, this is clear. The case upon which this Court passed judgment was not that made before the State Court. 184
Then, if Hyatt was free to make his own case, and made a different case from that upon which this Court had decided the former suit, was not he entitled to do so and to the benefit of having done so? Was not this the new case which this Court had declared that he was so free to make?

And, if, on the other hand, Mrs. Carson repudiated before the State Court the only ground on which this Court had decided for her, was she not also free to do so? And was not the State Court equally free to decide the cause on the ground she chose to rest it before them? The Chief Justice 185
answers this in the *Insurance Company v. Pechner*. "The Court had the right," he says, "to take the case as made by the party himself."

Hyatt not only met, but made a different case from that decided against his former partners.

1. He showed—as his former partners in their defence had not done—that the accounts which the executors of Carson had filed, and with knowledge of which they had charged McBurney, as of record, were illegal accounts; that the distribution of the estate, which they claimed then to have 186
been made, *could not then* have been made, and that under the decision of the State Courts the entries were improper, and the filing of the account illegal, and consequently without notice to any one. (*See Transcript Record, p. 48, 44, f. 91, 92.*)

2. He showed—as his former partners in their defence had not done—that at the time when the executors of Carson had received the money for the bonds secured by the mortgage, they could have invested the same in the best securities, first mortgage Railroad bonds and city of Charleston 6 187
per ct. stock, (*See testimony of John S. Riggs and H. H.*

DeLeon.—Trans. Record, p. 16), and that under the long established rule in South Carolina, a purchaser was not bound to see to the application of the purchase money. (*See* opinion of Chief Justice Simpson. *Trans. Record, p. 48, f. 104.*)

Is it any wonder, then, that the Courts of South Carolina,
188 familiar with all the surroundings—familiar with the location of the property, and knowing that the value of the plantation depended, in a great measure, upon the rice mill upon it, and the negroes and stock with which it was worked, and recollecting that this plantation was within the sound and almost within view of the Federal guns, which, from fleet and army, were then attacking the city of Charleston, and that at this time Mr. Lincoln's proclamation, freeing all negroes who should come within the Federal lines, had just been issued, so that, with the fall of the city, the negroes would be freed
189 and the mill probably burnt (which burning did actually happen)—is it surprising that the Courts of the State should, under all these circumstances, consider that such property was of the most precarious kind?

By a memorandum of agreement entered into by Counsel, (*Record, McBurney v. Carson, p.* 101), it appears, that to pay the purchase money of the plantation, Dean Hall, the appellants sold a large amount of cotton, to wit: six hundred bales, the proceeds of which were deposited, with their other money, in the South Carolina Bank, and their checks were
190 drawn against the same. By Mr. Johnson's testimony, (p. 31), the complainant shows, that the check for $84,207.56 was paid by a credit to Robertson and Blacklock on the same day.

It will be observed, that in point of fact no Confederate currency passed between the appellant and Ball. They gave their checks to Ball for the purchase money—one of these checks for $84,207.56, and the other for $16,000. The first was deposited by Robertson and Blacklock to their credit in the same Bank. Now, suppose that Robertson and Blacklock had left their money on deposit in Bank. They would
191 then have had a credit at the end of the war in that Bank to the amount of the value of the Confederate currency reduced

to the value of United States currency as of the date of the deposit. *Whaley v. Bank of Charleston*, 5 *Rich. N. S., 189*, This rule of the Courts of South Carolina has recently been announced, also, by this Court. *Effinger v. Kenney, 115 U. S., 566.*

By the rule of computation, adopted in *Mayer v. Mordecai*, 1 *Rich. N. S., 383*, cited by Mr. Chief Justice Simpson in his 192
opinion, the $100,000 estimated in Confederate currency at the time of this transaction was worth $33,333.33 of good money.

By an Act of the General Assembly of the State of South Carolina of 1869, (A. A., Vol. XIV., p. 277), it is enacted:

"SECTION 1. That the value of all debts and obligations, whether under seal or not under seal, created or contracted in Confederate States notes, or with reference to Confederate States notes as a basis of value, issued by the so-called Confederate Government, or in or by any bills, bonds or notes assimilated or made equivalent in value to Confederate States notes by any law or custom of trade * * * shall be determined by the value of said Confederate States notes in the 193
lawful money of the United States at the time such debts or obligations were created or contracted.

"Section 2. * * * the value of one dollar of lawful money of the United States in said Confederate States notes is declared as follows:

"1. During January and February, 1861, one dollar of lawful money was equal to, etc., etc.

* * * * * * * * *

"26. On the first day of April, 1863, one dollar of lawful money was equal to three dollars and fifty cents of Confederate States notes, and from day to day thereafter regularly increased in value until the thirtieth day of April, 1863, when one dollar of lawful money was equal to three dollars and eighty cents of Confederate States notes."

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The contract it will be recollected was made some time in March, and completed and the money paid on the 23d of April, 1863—taking therefore, the basis established by the Legislature of South Carolina, at $3.50 for the 1st of April, and $3.80 for 30th, we will put the value of one dollar in U. S. currency on the 23d April at $3.75 in Confederate currency. The decree fixes the sum of $31,000 due as principal on the bonds secured by mortgage of "Dean Hall," on the 23d April, 1863. Thirty-one thousand dollars in U. S. currency was worth—as established by the Act just 195
cited at $3.75 to one—$116,250. The purchasers then actually paid at least the equivalent of $26,666, in U. S.

currency at the time, out of an amount due on the bonds fixed by decree at $31,000, leaving a difference of only $4,334 in U. S. currency between the amount due on the bonds secured by the mortgage and that actually paid—a difference fully accounted for by the difference in value of the place in a time of prosperity and in a time of adversity. He who
196 asks equity must do equity. The executors received from the purchasers the equivalent of $26,666 in lawful money, and for that conveyed to them the plantation. If Mrs. Carson was dissatisfied with the bargain they made, it was easily remedied; the purchasers would gladly have restored the land for the value they gave for it, aye! for the half of it. When Mrs. Carson purchased it in at her own sale there were no bidders against her over $5,200, at which sum she bought, and Mr. Lowndes, in his affidavit for removal, admits that he cannot aver that Dean Hall is of greater value than
197 $5,500.

But in the case of *Mayer v. Mordecai*, quoted by Chief Justice Simpson, the Supreme Court of South Carolina has assumed the value of Confederate notes as of that time compared with United States currency at *three* to one, which would make the sum paid by the purchasers $33,333.33, against $31,000 now found due upon the bond as of that date; by which, the purchasers actually paid to Ball more than was due upon his bond to the executors.

The language of Mr. Justice Field, in *the Confederate Note*
198 *Case, 19 Wall, 555*, is most appropriate to this case:

"The Treasury notes of the Confederate Government were issued early in the war, and though never made a legal tender, they, soon to a large extent, took the place of coin in the insurgent States. Within a short period they became the principal currency in which business in its multiplied forms was then transacted. The simplest purchase of food in the market, as well as the largest dealings of merchants were generally made in this currency. Contracts thus made not designed to aid the insurrectionary government, could not, therefore, without manifest injustice to the parties, be treated as invalid between them. Hence in *Thorington vs. Smith*, the Court enforced a contract payable in these notes, treating them as a currency imposed upon the community
199 by a government of irresistible force. As said in a later case referring to this decision, It would have been a cruel and oppressive judgment

if all the transactions of the many millions of people composing the inhabitants of the insurrectionary States for the several years of the war had been tainted with illegality because of the use of this forced currency when those transactions were not made with reference to the insurrectionary government. *Hananar v. Woodruff, 15 Wall, 448.*"

Is it extraordinary that, under these circumstances, the Courts of the State should hold that Hyatt, McBurney & Co. gave full value for the property, and that it was an excellent 200
and advantageous arrangement for Mrs. Carson and her sons, if only Robertson had invested the money he received in Railroad bonds or city stock instead of in Confederate bonds?

Is it surprising that the State Courts should adopt Mr. Young's own opinion of this transaction, which he signed and filed for Mr. Robertson as his answer to Mrs. Carson's bill, when he was on *our* side of the case, wherein he denied "that she—Mrs. Carson—has any ground to hold him (Robertson) responsible;" "that he acted in the management and
administration of the said trust estate as a prudent man would 201
have done, as he himself did do," and that "his opinions were approved and confirmed by the advice of the late Honorable James L. Petigru, the father of the complainant, who had been throughout his business life the legal adviser and director of —him—the defendant, and also the legal adviser and director of said complainant, Mrs. Carson?" (*Trans. Record, Carson v. Robertson, p. 38, f. 96; McBurney v. Carson, p. 24.*)

Is it surprising, with this before them, that not all the subsequent ingenuity, learning, industry, and eloquence of our friend for Mrs. Carson could efface the effect upon the Court 202
of this his first impression and representation of the case for Robertson?

Is it strange that the Chief Justice of the State, in delivering the opinion of the Court, under all these circumstances, should declare as their judgment?—

"*No one knowing the parties, and having the testimony before him, which Judge Pressley had—especially that the late lamented James L. Petigru, the father of Mrs. Carson, and grandfather of the other two beneficiaries under W. A. Carson's will, not only* 203
had full knowledge of the whole transaction, but desired and

approved its consummation—could, for a moment, believe that it was conceived and perpetrated in fraud."

Mrs. Carson has inscribed these exquisite lines upon the tomb of her father:

"In the great civil war
He withstood his people for his country;
But his people did homage to the man
Who held his conscience higher than their praise.
And his country
Heaped her honors on the grave of the Patriot,
To whom living
His own righteous self-respect sufficed
Alike for motive and reward."

Can she now stigmatize as fraudulent an arrangement which, as her father and counsellor, he advised for her advantage?

EDWARD McCRADY.
EDWARD McCRADY, JR.

APPENDIX.

A.

Extract from Answer of Alexander Robertson to Bill of Caroline Carson, filed 8th May, 1867, *Trans. Record, McBurney v. Carson, p. 2324:*

* * * * * * * 206

"And this defendant further answering, * * * * that after the sale to the said Elias Nonus Ball, and his failure to pay interest altogether, or paying only small parts thereof on his said purchase for several successive years, by which his said debt was annually increasing, with no increase of the security, therefore it seemed advisable to this defendant to take in payment of his obligations the currency of the Confederate States, a then *de facto* government, which enjoyed the confidence of the entire South, *and his opinions were confirmed by the advice of the late Honorable James L. Petigru,* 207 *father of the complainant, who had been throughout his business life the legal adviser and director of the defendant, and also the legal adviser and director of said complainant,*" &c.

* * * * * * *

(Signed) H. E. YOUNG,
Defendant's Solicitor.

B.

Testimony of William Whaley, taken 23d June, 1868, in Carson v. Robertson. *Trans. Record. McBurney v. Carson,* 208 *p. 32–33.*

Examination in chief.

1. I know of the sale by executors of Carson to Hyatt, McBurney & Co. of Dean Hall. (Mr. Lowndes here reserved all right of objection to all this testimony on the ground that the references in this case have been closed.)

2. I negotiated the matter for the parties on both sides, more especially representing Mr. McBurney.

3. I carried my negroes to Dean Hall in 1861, and engaged 209 in planting with Elias Ball, then the proprietor. After plant-

ing for some time became dissatisfied with Mr. Ball, and, to get rid of him, persuaded Mr. McBurney to buy him out, and I conducted the negotiation. To perfect the title the executors of Carson had to satisfy the mortgages on the property. Pending the matter I was attending a meeting of the Commission on Mr. Petigru's Code, as one of the committee to
210 examine the same in the spring of 1863.

This was at Mr. Heng's (King's), and Mr. Petigru seated there at the time. Mr. Petigru was aware of the negotiations for the purchase and sale. He came into the room where the committee was in session, and insisted that I should leave the committee and go up to Dean Hall and conclude this matter, as he said Ball paid nobody, and he could get no money for the boarding and schooling of Jimmy Carson, the child of Mrs. Carson, and his grandchild. Mr. Petigru expressed great anxiety to have the matter wound up, to wit, the pur-
211 chase and sale. (Mr. Lowndes, for complainant, objected to the testimony of Mr. Petigru on the ground of its irrelevancy.)

* * * * * * *

118-279

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FILED
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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

CARSON
vs.
HYATT.
} Nos. 245 and 462.

Brief in Reply for Defendants in Error.

1. Sections 294 and 295 of the Code of Practice of South Carolina, quoted by Messrs. Seward & Lowndes, for appellants, were repealed, as to the County of Charleston, by the act of the General Assembly of 1878, which repeal has been extended from county to county until now the law as to referees is in existence in but one or two counties. The 1st section of the act of 1878 is as follows, p. 608:

> "SECTION 1. *Be it enacted, &c.*, That sections two hundred and ninety-four, two hundred and ninety-five, two hundred and ninety-six, two hundred and ninety-seven, and four hundred and ninety-six of the said Code of Procedure, relating to Trial by Referees, shall no longer have any force or operation within the County of Charleston."

Sections 2, 3 and 4 provide for the appointment of two Masters for each county.

> "SECTION 5. The said Masters shall each possess the powers, perform the duties, and be subject to the liabilities prescribed in and by the act of the General Assembly heretofore mentioned in relation to the powers,